LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 15 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 445

EDWARD MARTIN AND PATRICIA MARTIN, HIS WIFE, PETER S. PEDERSEN, SR. AND MARION PEDERSEN, HIS WIFE, AND PETER S. PEDERSEN, SR., Individually,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOHN O'C. FITZGERALD,
10 S. LaSalle Street,
Chicago, Illinois 60603,
CEntral 6-2222,
Counsel for Petitioners.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

PAGE

Opinions and decisions below 7, 41-49, 50-79

Jurisdiction 8

Questions Presented 8-10

Constitution, statutes, federal rules and parts of record below involved 10

Statement 2-7

Argument 11-27

Conclusion 27

Certificate of Service 28

Appendix A (Constitution, statutes, federal rules and parts of record below involved) 29-40

Appendix B (Opinion and decision of Court of Appeals below) and Petition 41-49, 78-89

Appendix C (Opinions and decisions of The Tax Court of the United States) 50-77

Authorities Cited.

Cases.

American Automobile Association v. United States, 367 U. S. 687 17

Bolling v. Sharpe, 367 U. S. 497 (1954) 19

Bressner Radio Inc. v. Commissioner, 267 F. 2d 520 .. 17

Clark, Attorney General, as Successor to the Alien Property Custodian v. Allen, et al., 331 U. S. 501 13

Cohen Grocery v. United States, 255 U. S. 81 19

Commissioner v. Bilder, 369 U. S. 269 18

Conley v. Gibson, 355 U. S. 41 15
Engel v. Vigale, 370 U. S. 421 24
Everson v. Board of Education, 262 U. S. 447 24
Federal Coal Co. v. Royal Bank of Canada, 10 F. 2d 679 (2d Cir.) 14
Fleming v. Dierks Lumber and Coal Company, 39 F. Supp. 237 13
Frothingham v. Mellin, 262 U. S. 447 22
Hodge v. Erie R. Co., 257 F. 494, 497 15
International Harvester Co. v. Kentucky, 234 U. S. 579 19
James v. United States, 364 U. S. 213 17
Jarecki v. Searle & Co., 367 U. S. 303 17
Kammerling v. Athletic Mining and Smelting Co., 3 F. 2d 574 14
Loan Association v. Topeka, 20 Wall. 655 21
Edward and Patricia Martin, et al. v. C. I. R., 358 F. 2d 63 44
McCallum v. Board of Education, 333 U. S. 203 24
McGowan v. Maryland, 366 U. S. 42 24
Mitchell v. Duquesne Brewing Co., 34 F. R. D. 145 15
Parkerberg v. Brown, 106 U. S. 487 21
Pollack v. Farmers Loan & Trust Company, 157 U. S. 429 19
Rivoli Operating Co. v. Loew's, Inc., 7 F. R. D. 219 (D. C. N. Y.) 13
Rudolph v. United States, 370 U. S. 269 18
Schenley Distillers v. U. S., 153 F. Supp. 898, aff'd 255 F. 2d 334 (3rd Cir.), Cert. Dnd., 358 U. S. 835 ... 13

Sterling Box Co. v. Morningster-Paisley, Inc., 36 F. R. D. 96, 98 15
Turnbow v. Commissioner, 365 U. S. 535 17
U. S. v. Butler, 297 U. S. 1 21
United States v. Davis, 370 U. S. 269 18
U. S. v. Skinner, 5 F. 2d 708 14
United States v. Union Central Life Insurance Co., 368 U. S. 291 18
U. S. v. United Shoe Machinery Co., 234 F. 127 14
Waldweiler v. Commissioner, 351 F. 2d 587 (7th Cir.). 6
Western Real Estate Co. v. Hughes, 172 F. 208 14

OTHER AUTHORITIES.

United States Constitution:
Article I, Section 2, Clause 5 29
Section 3, Clauses 6 and 7 and Section 8 29
Article III, Sections 1 and 2, Clauses 1 and 4 30
First Amendment 30
Fifth Amendment 30
Seventh Amendment 30-31
Ninth Amendment 31
Sixteenth Amendment 31

Statutes.

Judicial Code:
28 U. S. C. 134 32
28 U. S. C. 136 32
28 U. S. C. 144 32
28 U. S. C. 171 32-33
28 U. S. C. 172 33
28 U. S. C. 1346(a)(1) 31
28 U. S. C. 1355 31
28 U. S. C. 2402 31

Internal Revenue Code:
26 U. S. C. sections 1, 11, 103, 167, 501, 611, 613, 911, 912, 931, 1001 and 1201 37
26 U. S. C. section 6215(a) 34-35
26 U. S. C. section 7421 35
26 U. S. C. section 7422 35
26 U. S. C. section 7441 33
26 U. S. C. section 7442 33
26 U. S. C. section 7443 33-34
26 U. S. C. section 7444 34
48 U. S. C. 1421(h), (i) .....

Federal Rules of Civil Procedure:
Rule 8(a), (b), (c), (d), (e), (f) 37-38

Tax Court Rules of Practice:
Rule 7 (a) (1), (2), (c) (e) (4), (b) (5) 38
Rule 14 (b) 38
Rule 17 (c) 38-39
Rule 18 (a) 39
Rule 19 (2) 39
Rule 21 39
Rule 26 (a) 39
Rule 27 (a) (1) 39-40
Rule 40 40

Miscellaneous.

70 Harvard Law Review .....
45 West Virginia Law Journal .....
Parts of Record Below Involved:
Petitions to Tax Court 50-55
Motion to Dismiss for Failure to Properly Prosecute 56-58
Objections, Answer and Suggestions to Motion to Dismiss 60-63

Transcript of Tax Court Proceedings Held on November 25, 1964 64-69

Transcript of Tax Court Proceedings Held on December 30, 1964 71

Tax Court Order of December 30, 1964 73

Petitioners Telegram to Tax Court Received by Tax Court on February 17, 1965 at 8:57 A.M. (which referred to previous telegram of December 28, 1964 referred to in Proceeding) 69

Tax Court orders of February 17, 1965 74

Tax Court order of March 19, 1965 Orders Appealed From 75-77

Petitions to Appeals Court Below 78-90

Decision of the Appeals Court Below 44-49

Appendices:

Appendix A—Constitutional and Statutory Provisions Involved 29-40

Appendix B—Pertinent Part of Record in the United States Court of Appeals for the Seventh Circuit 44-49, 78-90

Appendix C—Pertinent Part of Record in the United States Tax Court 50-77

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. .....

EDWARD MARTIN AND PATRICIA MARTIN, HIS WIFE, PETER S. PEDERSEN, SR. AND MARION PEDERSEN, HIS WIFE, AND PETER S. PEDERSEN, SR., Individually,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners, Edward Martin and Patricia Martin, husband and wife, Peter S. Pedersen, Sr. and Marion Pedersen, husband and wife, and Peter S. Pedersen, individually, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit entered in the above cases on March 18, 1966.

These are three separate cases sought to be reviewed on certiorari to the same court and they involve identical or closely related questions, and therefore this single petition for writ of certiorari covering said three cases is here presented as is allowed by Rule 23, paragraph (j) (5) of the Rules of this Court.

STATEMENT.

Petitioners, Edward Martin and Peter S. Pedersen, Sr., were principal shareholders, directors and officers, and petitioners, Patricia Martin and Marion D. Pedersen, were the wives of said Edward Martin and Peter S. Pedersen, Sr., respectively, of M. P. H. Manufacturing Corporation and Wonder Building Corporation of America. Two of the cases here sought to be reviewed are husband and wife cases. All three cases involve identical closely related questions. This single petition for writ of certiorari covering all cases is submitted as provided for, Rule 23 (j) (5) of this Court.

On May 7, 1964, each of the petitioners received statutory "90-day Notices" from Respondent informing them of claimed deficiencies, penalties and interest for the calendar years 1957 to 1961 both inclusive. The reasons, grounds, and the sizeable amounts of the deficiencies, being lengthy, are set forth in the Statements attached to Respondent's said Notices (R. 18-29, 38-45 and 51-53).

The principal source of petitioner's taxable income and allowable deductions under the Federal Income Tax Code was derived from transactions with, or on behalf of, said corporations (R. 89) who were engaged in the manufacture, sale and distribution of patented self-supporting galvanized steel sheet for industrial, commercial and other building structures. The patents covered protection not only in the United States, Canada and Latin American countries, but in Europe, Australia, Japan and certain other countries elsewhere throughout the world.

Said M. P. H. and Wonder Building, knowing of the "cold war" and believing that "fall-out shelters" were es-

sential to the general health and welfare of the Nation, and that the government and the inhabitants had recognized the need and that there was a ready saleable market therefor at a reasonable profit, and that the government intended to create a program and aid and assist financially and otherwise the same, and knowing that their patented product was well adapted to "fall-out shelters," engaged the former Director of Civilian Defense for the United States, under President Eisenhower, to set up and handle the "fall-out shelter" program of said corporations; unfortunately, it later developed that the United States Government and its people were not prepared to accept "fall-out shelters", all of which brought about the bankruptcy of said M. P. H. and Wonder Building.

Unable to pay these deficiency assessments, penalties and interest prior to contesting them, petitioners filed petitions for redetermination in the Tax Court of the United States (R. 10-29, 30-45, 46-53). Respondent filed motions to dismiss for failure to properly prosecute (R. 54-56, 57-59, 60-61), to which petitioners filed objections, answer and suggestions and, having in mind "inconvenience and costs" of attending a hearing at Washington, D. C., or elsewhere than Chicago, Illinois, in writing asked for a hearing of said motion to dismiss at Chicago, Illinois (R. 16, 36, 50).

At the time of the preparation and filing of their said petitions in the Tax Court, petitioners were unable to obtain the benefit of certain material and pertinent books, records, belongings and effects, of each of said bankrupt corporations because as they alleged they were reliably informed and believe, they had been:

(1) destroyed and/or irreparably damaged by unavoidable fire;

(2) lost and/or misplaced while, and caused by, loss of lease of premises occupied by said corporations,

and Writ of Restitution Proceedings brought by Lessor; and

(3) incapable of obtaining because of commingling and inadequate cataloging of large volumes of said books, records, belongings and effects, not destroyed by fire or otherwise lost or misplaced.

(Par. 6 of Petitions, R. 6, 31-32, 47-48).

Several ex parte hearings of said motion to dismiss were held by the Tax Court, and notwithstanding petitioners objections, answer and suggestions:

(1) all hearings were held at Washington, D. C. and none were held at Chicago, Illinois;

(2) no transcripts of proceedings thereat were furnished petitioners until the Tax Court record was sent to the Appeals Court, although petitioners, by telegrams on December 28, 1964 and February 17, 1965, had requested such transcripts at petitioners costs (R. 101, 102);

(3) examination of the transcripts sent by the Tax Court to the Appeals Court show no specific reference to petitioners objections, answer or suggestions whatever (R. 87-94, 97-99, 104-105);

(4) comparison of paragraphs 5 and 6 of the petitions (R. 11-14, 33-36, 47-48) with paragraph 2 of the motion to dismiss (R. 55, 58, 60-61) show:

(a) Respondent by his response to petitioners' allegations of unavailability of said bankrupt corporations, books, records, etc., has thereby created an answer notwithstanding his entitling his pleading a motion to dismiss, and a triable issue of fact, especially where respondent has merely stated:

"2. Respondent has contacted the office of

the Clerk of the United States District Court for the Northern District of Illinois and has learned that the cases of In the Matter of MPH Manufacturing Corporation, Bankrupt Docket No. 62 B 3109 and In the Matter of the Wonder Building Corporation of America, Bankrupt Docket No. 62 B 5669, have not been closed; that the books and records of the Bankrupt Corporations are in the possession of Mr. Charles David Maley, 231 South LaSalle Street, Trustee in Bankruptcy and with the American Auction Associates, Inc., 12 North Halsted Street, Chicago, Illinois, and that such books and records are available for inspection."

(b) Respondent has not verified the same. Or caused any of his informants to verify the statements made in Commissioner's motion.

Whereupon, on March 19, 1965, the Tax Court dismissed these three cases and ordered and decided that there are deficiencies in income tax penalties and interest due from petitioners in substantial amounts, as evidenced by said orders of dismissal (R. 106, 107, 108), this being done *notwithstanding* the unavailability of said bankrupt corporations books, records, belongings and effects; and further that: the Tax Court, Judge C. Rogers Arundell, and Mr. Andrew Coxe, Attorney for Respondent, at an *ex parte* hearing on November 25, 1964, had, among other things, stated:

"The Court: * * *. This case seems to me to be a little different from the ordinary case of failure to properly set forth facts."

"Mr. Coxe: It is, Your Honor."

"The Court: And it is a substantial case, and the matter is in bankruptcy, and it might be difficult at the moment, to get all the facts, so I don't think it ought to be dismissed."

"Mr. Coxe: No sir, Your Honor, * * *." (R. 94.)

Petitioners in the Court of Appeals for the Seventh Circuit below, raised the issues presented by this petition for writ of certiorari, other than the issue that the Income Tax provisions of the Internal Revenue Code were unconstitutional, or yields or tends to yield an unconstitutional result, in and about the premises, because they are contrary to and violates Amendment V of the Constitution of the United States, Petitioners include Article I, section 8 and Amendment XVI in these regards, which is hereby for the first time raised by Petitioners.

Except that different taxpayers-shareholders of the M. P. H. Manufacturing Corporation, and Wonder Building of America and two additional taxable years, are here involved, the material facts[1] and the legal criteria pertinent to a determination of the validity of petitioners' two remaining contentions, upon which they predicate claims of Tax Court error, are substantially identical with those considered and adjudicated by this Court in its recent decision in *Waldweiler* v. *Commissioner*, 7 Cir., 351 F. 2d 587. As to these phases of petitioners' cases *Waldweiler* represents the law of this Circuit, is a controlling precedent, and is fully dispositive of the petitioners' contentions. The orders of the Tax Court are therefore affirmed.

Implicit in the decision of the Court below is a fundamental error. It is to be found in the footnote which reads as follows:

> "Here, as in *Waldweiler*, counsel for the Internal Revenue Service made averment, undenied by petitioners, with respect to the existence and availability of bankrupt corporate books and records."

---

1. Here, as in *Waldweiler*, counsel for the Internal Revenue Service made averments, undenied by petitioners, with respect to the existence and availability of the corporate books and records.

N. B. It should be noted that motion to extend time for filing petition for writ of certiorari in the *Waldweiler* case was denied solely because the motion arrived at 2:05 a.m., one day late.

The fact is that in Paragraph 6 of the Petition in the Tax Court petitioners made the critical averments in respect of these books and records of MPH Manufacturing Co., and Wonder Building Corporation of America.

Counsel for the Commissioner denies what petitioners said in paragraph 6 of their Petitions. That, as petitioners read the Record, created a triable issue of fact which the Commissioner believed, as Tax Collectors do, could be resolved only in his favor, like the proverbial Justice of the Peace, having heard one side of the case, the controversy would not suffer the adversary to present his case lest that might create confusion in his mind. The Tax Court, without hearing the other side of the case, resolved all the matters in favor of the Commissioner and the Court of Appeals, Seventh Circuit did also.

The Court of Appeals, Seventh Circuit on appeal to that court, after consideration of the case, affirmed the judgment of the Tax Court, on March 18, 1966.

An order of this Court, entered on June 16, 1966, extended the time within which Petitioners might file their Petition for a Writ of Certiorari until August 15, 1966. Petitioners have filed it here.

OPINION BELOW.

The orders of dismissal of the cases and the affirmance of the Respondent's assessments against Petitioners of the claimed Federal Income Tax deficiencies, penalties and interest are not officially reported. (Reserving our contention that said "Tax Court" is not a court).

The opinion and judgment of the United States Court

of Appeals for the Seventh Circuit is reported at 358 F. 2d 63.

No rehearing was requested or allowed by said Court of Appeals.

JURISDICTION.

Reserving our contention that the Tax Court of the United States is not a "court," it dealt with these cases in the first instance, 28 U. S. C. 7441, 7442.

The orders of dismissal and of said affirmance of the Tax Court of the United States were made and entered on March 19, 1965, and the opinion and judgment of the United States Court of Appeals for the Seventh Circuit was made and entered on March 18, 1966; copies thereof are appended to the Appendix filed with this petition at pp. 75-77.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and 26 U. S. C. 2101(c), 6213 and 7482.

This Court has extended the time to file this Petition for a Writ of Certiorari to and including August 15, 1966.

QUESTIONS PRESENTED FOR REVIEW.

The questions presented for review follow:

1. Whether a taxpayer seeking review of asserted deficiencies and penalties asserted by the Commissioner may object to any determination made by the Tax Court, in the light of the fact that appeals may be allowed to a Court organized under Article III of the Constitution if he follows the procedure of paying the tax claimed by the Commissioner and suing to effectuate the return of the money so paid, whereas other taxpayers are relegated to the Tax Court which is not a court but rather an agency of the Internal Revenue Service?

(a) Whether the proceeding afforded to the taxpayer

who has sufficient money to pay asserted deficiencies and penalties and then sue for the return of money so paid in a District Court of the United States real court squares with the Fifth Amendment when other taxpayers are relegated to the court not organized under Article III of the Constitution?

2. Whether the Tax Court may dismiss a petition of a taxpayer for failure to prosecute his appeals by reason of the taxpayer's failure to comply with its Rule 7 (a) (2) by reason of the taxpayer's inability to state a clear and concise statement of facts in his Petition, where as here, the taxpayer could not have the benefit of books and records of corporations not available which were necessary to making of a short and concise statement as required by the Tax Court's Rules by reason of the fact that such books and records had been burned, lost or otherwise unavailable to taxpayer by reason of fire, loss of possession by taxpayer due to involuntary dispossession of such corporation and by reason of the fact that the critical corporations were in bankruptcy and their books and records were unavailable to the taxpayer?

(a) Whether the law recognized that "facts" may be stated in pleadings designed to effectuate a determination of cases before any tribunal?

(b) Whether the Commissioner of Internal Revenue may create issues of fact where, as here, his only defense is statement obtained by him by virtue of double hearsay unverified by the Commissioner or his informants?

(c) Whether, assuming such information is believed to be true, the Tax Court may assume that the Commissioner's statement of "facts" asserted by Commissioner in his motion are true, rather than create a triable issue of facts at a maximum, which required a hearing by the critical tribunal?

3. Whether the Income Tax provisions of the Internal Revenue Code, considered in their totality, violate the First Amendment, the due process clause, and the confiscation of private property clause, of the Fifth Amendment, or either of such clauses, and whether the Sixteenth Amendment is violated by the provisions of the Income Tax statutory provisions of the Internal Revenue Code?

CONSTITUTION, STATUTES, FEDERAL RULES OF CIVIL PROCEDURE. THE TAX COURT OF THE UNITED STATES RULES OF PRACTICE, AND THE PERTINENT PARTS OF THE RECORD BELOW INVOLVED.

The pertinent portions of (a) the Constitution of the United States: Article I, Section 8, Article III, sections 1 and 2, Amendments I, V, VII, IX and XVI; (b) Statutes: 26 U. S. C. sections 1, 11, 103, 167, 501, 611, 613, 911, 912, 931, 1001, 1201, 6215 (a), 7421, 7422, 7441, 7442, 7443 and 7444; 28 U. S. C. sections 134, 136, 144, 171, 1346(a) (1), 1355 and 2402; and 48 U. S. C. section 1421 (h) (i); Federal Rules of Civil Procedure Rule 8 (a), (b), (c), (d), (e) and (f); The Tax Court of the United States Rule 7(a) (1), (2), (c), (2) (4), Rule 14 (b), Rule 17 (c), Rule 18 (a), Rule 19 (2), Rule 21, Rule 26 (a), Rule 27 (a) (1) and Rule 40; Record Below Petition to Review filed in said Tax Court, Motion to Dismiss Cases, Objections, Answer and Suggestions to Motion to Dismiss, Transcripts of Proceeding in said Tax Court of hearings on November 25, 1964 and December 30, 1964; Tax Court orders of December 30, 1964 and February 17, 1965, and March 19, 1965; and petitioners' telegram received by the Tax Court on February 17, 1965 at 8:57 A. M. referring to petitioners' telegram to Tax Court sent on December 28, 1964, are set forth in the Appendix at pp. 69-70.

ARGUMENT.

I.

THE TAX COURT IS NOT A COURT; IT IS BUT AN AGENCY OF THE INTERNAL REVENUE SERVICE.

It was intended to be an *independent agency* but it is not. It is housed in the Internal Revenue Building at Washington, D. C., and the "judges" cannot help but be partial to the Commissioner both because the Federal Income Tax Laws derive revenue to the Government and because they are thrown into almost daily contact with the Commissioner and his staff and their philosophy and thinking.

Furthermore, petitioners were and are entitled to a review of their grievances in a Constitutional Court (Article III, Sections 1 and 2 thereof) before seeking further review in a Court of Appeals.

Petitioners are entitled to a jury and to the benefit of affidavit of prejudice in a District Court of which they are deprived when forced to go to the Tax Court; and to the convenience and less cost associated with a District Court; as well as to the broad legal knowledge and experience of Judges of a District Court; as well as other benefits derived from a Constitutional Court and not available in the Tax Court.

Petitioners here adopt as their own the applicable contentions and argument presented to this Court in the cases of *Nash Motors Miami, Inc.* v. *C. I. R.* and *John W. Amos* v. *C. I. R.*, later pending in this Court (resuming petitioners' contention that The Tax Court of the United States is no court at all).

II.

RESPONDENT'S MOTIONS TO DISMISS LOOKING TO THE SUBSTANCE AND THE REALISTICS IN LAW AND IN FACT, CONSTITUTED "ANSWERS" AT LEAST TO THE ALLEGATIONS OF PARAGRAPH 6 OF THE PETITIONS FILED IN THE TAX COURT OF THE UNITED STATES.

Paragraph 6 of the Petitions asking the Tax Court of the United States to Review and Re-determine the correctness at law and in fact of the claimed Federal Income Tax deficiencies, penalties and interest assessed by Respondent against Petitioners and read:

> "6. The facts upon which Petitioners rely, *other than the ultimate facts stated herein*, as a basis of these proceedings is impossible to present because:
>
> (a) Said M. P. H. Manufacturing Corporation and Wonder Building Corporation has been adjudged a bankrupt and Petitioners are reliably informed and believe, and therefore state the fact to be, that certain of said corporate books, records, belongings and effects have been:
>
> (a-1) destroyed and/or irreparably damaged by unavoidable fire; and
>
> (b) lost and/or misplaced while, and caused by, loss of lease of premises occupied by said corporation, and Writ of Restitution Proceedings brought by Lessor; and
>
> (c) incapable of obtaining because of commingling and inadequate cataloging of large volumes of said books, records, belongings and effects, not destroyed by fire or otherwise lost or misplaced." (R. 10-17, 30-37, 46-50, App. 50-55).

Respondent in his so-called Motions to Dismiss, paragraph 2 thereof, replied:

> "Respondent has contacted the office of the Clerk of the United States District Court for the Northern District of Illinois and has learned that the cases of In the Matter of M. P. H. Manufacturing Corporation,

Bankrupt, Docket No. 62 B 3109, and In the Matter of Wonder Building Corporation of America, Bankrupt Docket No. 62 B 5669, have not been closed; that the books and records of the Bankrupt Corporations are in the possession of Mr. Charles David Maley, 231 South LaSalle Street, Trustee in Bankruptcy and with the American Auction Associates, Inc., 12 North Halsted Street, Chicago, Illinois, and that such books and records are available for inspection." (R. 55, 58, 60-61, App. 56-58).

The posture of these cases, at the time of the decisions of said Tax Court; was determination of the sufficiency of the petitions as to compliance with the requirements of Rule 7(a)(c)(5).

There being no evidence adduced, whether the petitions conformed therewith depend upon the type of the determination, the situation of the parties and the relief sought by petitioners. *Schenley Distillers* v. *U. S.*, 153 F. Supp. 898, aff'd 255 F. 2d 334 (3rd Cir.), Cert. Dnd., 358 U. S. 835; *Fleming* v. *Dierks Lumber and Coal Company*, 39 F. Supp. 237; *Rivoli Operating Co.* v. *Loew's, Inc.*, 7 F. R. D. 219 (D. C. N. Y.).

On appeal from the judgment dismissing these cases, following sustaining of Motion to Dismiss (more so where as here issue joined by answer), petitions will be liberally construed favorably to petitioners and with a view to substantial justice In the case of *Clark, Attorney General, as Successor to the Alien Property Custodian* v. *Allen, et al.*, 331 U. S. 501, where Mr. Justice Douglas at page 516, said:

> "* * * since the issue arises on the Government's motion for judgment on the pleadings, we proceed on the assumption *less favorable to it* * * *" (Emphasis stated).

The basis for the petitions was respondent's Notice of Claimed Tax Deficiency and Liability.

1. To substantiate such claim, respondent appended thereto certain writings of purported details designated:

"Statement";
"Adjustments to Taxable Income";
"Explanation of Adjustments";
"Computation of Tax".

Examination of said Notice of Deficiency, in the main, shows such details to be general and not specific and itemized.

2. To substantiate their claimed errors, all that petitioners were required to do, and all they could do (especially in view of certain destroyed, lost, misplaced and otherwise unavailable books, records, belongings and effects of the named bankrupt corporations, as stated in paragraph 6 of the petitions, the principal source of details and itemization of income, contributions and deductions, in and about the premises), was to state the facts in paragraphs 5 and 6 of their petitions. *Federal Coal Co.* v. *Royal Bank of Canada,* 10 F. 2d 679 (2d Cir.), *U. S. v. Skinner,* 5 F. 2d 708; *Kammerling* v. *Athletic Mining and Smelting Co.,* 3 F. 2d 574; *U. S.* v. *United Shoe Machinery Co.,* 234 F. 127; *Western Real Estate Co.* v. *Hughes,* 172 F. 208.

The purpose of pleading is to inform the opposing party and the court of the facts, issues and claims of the pleader. Here, Respondent already had the facts and created the basis of the issues and had knowledge, or should have had knowledge, of the expectation of a claim of error and request for review, and was informed and advised that pertinent and material sources of details and itemization were not available to petitioners.

Respondent should not, and cannot, under the facts and circumstances here, be allowed to claim and assert that

petitioners did not state clear and concise statement of facts, in and about the premises.

All that petitioners were required to do was to give sufficient notice to respondent and the Tax Court of the alleged errors and meet the generalities and aggregate amounts of the claimed tax deficiencies upon which petitioners proposed to proceed at the trial. *Conley* v. *Gibson*, 355 U. S. 41; *Mitchell* v. *Duquesne Brewing Co.*, 34 F. R. D. 145; *Sterling Box Co.* v. *Morningster-Paisley, Inc.*, 36 F. R. D. 96, 98.

For the purpose of determining the sufficiencies of the petitions, paragraph 2 of the Motion to Dismiss should, *and must*, be disregarded, and paragraph 6 of the petitions accepted as true, because what purports to be a Motion to Dismiss is in legal substance and effect an answer *requiring at least a pre-trial of the issues created thereby* rather than a dismissal of the cases. *Hodge* v. *Erie R. Co.*, 257 F. 494, 497. (Emphasis stated).

Furthermore, said Tax Court erred in dismissing the cases, as petitioners, in response to previous order of said Tax Court, to either file objections or answer said Motion to Dismiss, had filed objections, answer and suggestions and requested that should the same be overruled that they be afforded an opportunity to amend their petitions or file amended petitions. The said Tax Court did not afford petitioners the opportunity of a hearing on their objections, etc., but dismissed these cases, thereby depriving petitioners of a trial of the merits, which constitutes a deprivation of substantial justice.

With the foregoing in mind, an examination of the petitions show:

> "The basis for the petitions was respondents' Notice of Claimed Tax Deficiency and Liability. To substantiate such claim, respondent appended thereto certain writings of purported details designated "Statement",

"Adjustments to Taxable Income", "Explanation of Adjustments", and "Computation of Tax". (See Ex. "A" to Petition).

Examination of said Notice of Deficiency, in the main, shows such *detail* to be general and not specific and itemized.

The Appeals Court following the Tax Court did likewise thereby constituting error in these regards.

III.

A.

THE INCOME TAX LAWS COMMAND MILLIONS OF TAXPAYERS TO FILE A RETURN ONCE EACH YEAR BASED UPON THE SEVERAL SECTIONS OF THE INCOME TAX LAWS WHICH ARE NOT COMPREHENSIBLE TO THEM AND LEAVE THEM OPEN TO CRIMINAL PROSECUTION IF THEY FAIL TO DO SO.

That a taxpayer must file a return yearly is certain.

That the law is incomprehensible is as certain. It is not necessary to discuss this point at length. The sections of the Internal Revenue Code are so numerous that this alone would militate against any ordinary taxpayer understanding them. In addition, there are Rules and Regulations, rulings, brochures and publications, Tax Court decisions and Federal Court decisions which make them so complex, complicated, intricate and contradictory that it is impossible for an ordinary taxpayer to understand them. They in the first instance must decide them to make a return; even less other taxpayers who cannot possibly understand them. All this, the members of this Court well know. This shall not be discussed in detail because there is incontestable proof of that fact. It is now considered briefly.

The Courts required to interpret them surely do not

understand these laws. There is more abundant evidence of this than is necessary to establish the fact. However, in an abundance of caution, consider petitioners cases which illustrate this patent fact.

Below is shown the course of nine late cases reaching the Supreme Court of the United States.

James v. *United States,* 366 U. S. 213. There were five opinions in that case. Of these two were dissenting for different reasons and the remaining three—different reasons. The controlling opinions overruled *Commissioner* v. *Wilcox,* 327 U. S. 42, and it overruled the Seventh Circuit in the case under consideration.

* * * * *

In *Jaracki* v. *Searle & Co.,* 367 U. S. 303, the Court considered two cases, the other being *Polaroid,* on the theory that both cases involved the same principle. The Supreme Court considered these cases and affirmed the Tax Court and the First Circuit and reversed the Seventh Circuit.

* * * * *

In *American Automobile Association* v. *United States,* 376 U. S. 687, the Supreme Court sustained the Commissioner and the Tax Court and rejected the determination made by a Court of Appeals in the *Bressner Radio Inc.* v. *Commissioner,* 267 F. 2d 520, case. Four Justices of the Supreme Court dissented.

* * * * *

This is obviously violative of the Fifth Amendment.

In *Turnbow* v. *Commissioner,* 368 U. S. 337, the Supreme Court reversed the Seventh Circuit Court and the Tax Court and upheld the views of the Ninth Circuit. (More will be said of this case later.)

* * * * *

In *United States* v. *Union Central Life Insurance Company,* 368 U. S. 291, the State Courts of Michigan took one view, the Supreme Court of the United States an opposite view.

* * * * *

In *Commissioner* v. *Bilder,* 369 U. S. 499, the Commissioner took one view, the Tax Court another, the Court of Appeals still another, and the Supreme Court of the United States agreed with the Commissioner.

See: *United States* v. *Davis,* 370 U. S. 65; *Rudolph* v. *United States,* 370 U. S. 269.

All demonstrate the variances and conflicts between the opinions of the various courts, the Judges thereof and the Justices of the United States Supreme Court.

Mr. Justice Whitaker in *Turnbow* v. *Commissioner, supra,* summed up the situation existing in a great majority of the cases when he said:

> "Because of the arbitrary and technical character, and of the somewhat hodgepodge form, of the statutes involved, the interpretation problem presented is highly complicated; and although both parties rely upon the 'plain words' of these statutes, they arrive at diametrically opposed conclusions. That plausible arguments can be and have been made in support of each conclusion must be admitted; and, as might be expected, they have hardly lightened our inescapable burden of decision."

It must be recognized that if educated, disciplined, conscientious and experienced Judges and Justices of the Courts cannot agree on what these Sections of the Income Tax Laws mean, then the most educated layman taxpayer cannot be expected to understand them, to say nothing of the ordinary taxpayer and the subnormal taxpayer.

Conceptually, this involves the same rationale that gov-

erned the cases of *Cohen Grocery* v. *United States*, 255 U. S. 81, and *International Harvester Co.* v. *Kentucky*, 234 U. S. 579. To obey the command of the law, which requires the taxpayer to file a return, demands the exercise of powers men do not possess.

The demand of the Government that the taxpayer must calculate and pay his taxes once a year, at the risk of being punished, is a rank violation of the Fifth Amendment. On its face he cannot do it. This Government with all its powers, cannot compel him to do that which he cannot do.

B.

THE INCOME TAX LAWS CONSIDERED AS A WHOLE, TOGETHER WITH SECTIONS 7201 AND 7203, ARE SO DISCRIMINATORY THAT THEY VIOLATE THE FIFTH AMENDMENT.

The first hurdle that must be recognized is the innumerable cases which have held that since the Fifth Amendment, it, unlike the Fourteenth Amendment, contains no equal protection of the law clause and, therefore, discriminatory statutes are not unconstitutional under the Fifth Amendment.

But since *Bolling* v. *Sharpe*, 347 U. S. 497, it is well known that a law may be so discriminatory as to violate the Fifth Amendment. Indeed, it was always so. Attorney General's argument in *Pollack* v. *Farmers Loan Trust and Savings Bank*, 157 U. S. 429.(1).

No one who has any understanding of the Income Tax Laws can doubt that considered as a whole they are a complex of discriminations. And no one can doubt that these discriminations, which pervade every fibre of these laws, pass the onus of supporting the Government of the United States from one class of our people to another until no man can calculate who is the most injured.

A critical reading of Mr. Justice Field's concurring opinion beginning at page 592 in *Pollack* v. *Farmers Loan and Trust Company, supra,* will demonstrate the fact that these discriminations violate the Fifth Amendment and that a discriminatory so-called tax, such as embodied in the current income tax laws, is not a tax.

In addition, the Attorney General in the *Pollack* case pointed out that discriminations in a law relating to taxation would be an abuse of the taxing power; blondes and brunettes must be taxed alike, according to him.

To demonstrate how far legislatures will go under prevailing intellectual climatic conditions, if they be unrestricted by a written constitution, the English Parliament once enacted a taxing statute which assessed Protestants at one rate, Catholics at another and Jews at a third rate. See *Pollack* v. *Farmers Loan and Trust Company, supra,* concurring opinion of Mr. Justice Field.

But what of the discrimination in favor of those who extract oil from the ground; of those who invest their capital in municipal bonds; of those who seek tax shelters in long term capital gains, known to all to be an artificiality, (see Discussions Before the Committee on Ways and Means of the House of Representatives; (Surrey's Statement in Eighty-ninth Congress, U. S. Printing Office, 1960)) unknown to economics or reason; of those who grow Christmas trees and Shetland ponies; of those who run large businesses under the shelter of a "Foundation"; of those who obtain great advantages under the guise of "depreciation," where there is no depreciation, and of those who obtain shelter from paying taxes under the hundreds of discriminatory provisions of the Income Tax Laws, including those which discriminate in favor of those who live the life of the proverbial "Riley" in foreign countries under a tax shelter that is inexplicable. Note

also that corporations have tax advantages over human beings under the current law. When in the first *Pollack* case the shoe was on the other foot, the Attorney General justified higher taxes for corporations than for individuals he did it on the ground that the classification was proper because corporations had advantages over individuals. Since corporations are now assessed at lower rates than individuals it is clear that such an explanation is no longer tenable.

C.

WHERE, AS HERE, THE GOVERNMENT USES THE MONEY IT DERIVES FROM THE COLLECTION OF INCOME TAXES FOR UNCONSTITUTIONAL PURPOSES, SYSTEMATICALLY ANNOUNCED PRIOR TO COLLECTION OF THE TAX, THE ENACTION OF SUCH TAX VIOLATES THE FIFTH AMENDMENT.

In *Loan Association* v. *Topeka,* 20 Wall. 655; in *Parkersburg* v. *Brown,* 106 U. S. 487, and particularly in *United States* v. *Butler,* 297 U. S. 1, the Supreme Court recognized the principle that one group of States or United States taxpayers could not be taxed for the purpose of satisfying the economic well-being of another group of taxpayers, State or Federal. Giving the broadest interpretation to the general welfare clause, it held in *Butler* that processors of grain could not be taxed to create a fund from which farmers could be paid for not growing crops.

There, it was held that the power to tax did not include this type of taxation and that such a taxing law was, on its face, violative of the Fifth Amendment. It is believed that the "on its face" doctrine was invoked only to insure that the taxation was to be used for an unconstitutional purpose.

The members of Congress who vote for appropriations which they believe to be unconstitutional take the easy way out; if the law be unconstitutional, let the Supreme

Court declare it to be so. Collecting income taxes for the benefit of foreign people and foreign governments has been done systematically since World War II. Everyone knows that it is being done. This type of appropriation has reached a stupendous amount.

In short, the taxpayers of this nation are having their pockets picked by the exercise of the overwhelming supposed powers of the United States to satisfy the economic needs of other people and other governments. Beyond cavil, as is demonstrated by *Butler,* the Government lacks the power to do this.

The Government may take refuge in *Frothingham* v. *Mellon,* 262 U. S. 447, but it is believed that where, as here, the attack is made on the broad base, rather than the Frothingham "de minimus" basis, the Supreme Court should denounce the doctrine that the disposition of funds collected from taxation is insulated from any attack.

It is, therefore, pressed upon this Court that the systematic giving away of tax money to foreign people and foreign governments is violative of the Fifth Amendment, however socially desirable it may be.

D.

WHERE, AS HERE, THE INCOME TAX LAWS QUESTIONED WERE ENACTED FOR THE PURPOSE, AMONG OTHERS, OF MAINTAINING RELIGIONS, THEY ARE DENOUNCED BY THE ESTABLISHMENT OF A RELIGION CLAUSE OF THE FIRST AMENDMENT.

The First Amendment of the Constitution of the United States provides in part:

> Congress shall make no law respecting an establishment of a religion . . .

The Income Tax Laws in critical parts provide as follows:

(a) Section 107.

"In case of a minister of the gospel, gross income does not include—

(1) the rental value of a home furnished to him as part of his compensation; or

(2) the rental allowance paid to him as part of his compensation to the extent used by him to rent or provide a home.

(b) Deductions allowable to individuals and corporations include:

Section 170(c)(2)(B) which provides:

For purposes of this section the term charitable contribution means a contribution or gift to or for the use of . . .

a corporation, trust or community chest, fund or foundation organized and operated for religious . . . purposes.

These religious contributions represent deductions from the gross income and are not taxable, they are exemptions from any taxation.

The Treasury Department issued in 1960 a "Cumulative List" of Organizations described in Section 170(c). This contains the names of eligible corporations and other legal entities approved by the Treasury to the extent of 363 pages of close printings. They are mostly religious in character.

(c) Section 501 et seq. provides for exemption from any taxable income of certain organizations. Among these are:

(c)(3) Corporations and any community chest fund or foundation organized and operated exclusively for religious . . . purposes.

(d) Religious or apostolic associations or corporations . . .

These provisions of the Income Tax Laws are now examined to determine whether they square with the First Amendment to the Constitution quoted above.

The history of this provision in the First Amendment has

been made plain in the decisions of the Supreme Court of the United States. The Federal Government which had just been created was forbidden to do anything which would do or tend to do anything which might adversely affect the high and impenetrable wall thus created between the church and the Federal Government just organized.

When the Supreme Court "absorbed" the First Amendment in the Fourteenth Amendment, states were forbidden to do anything which might affect this high and impenetrable wall.

(When it is said in this brief that the Government pays a part of the bill by allowing exclusions, exemptions, deductions and the like, it means that the Government, by use of these techniques, is paying a part of the bill by allowing the taxpayer freedom from taxation of the amount of taxes he would be required to pay, absent the tax advantage given to him. It is not meant that the Government actually issues its check, but rather that it credits the taxpayer's bill for taxes which would otherwise be due. In the end it amounts to the same thing from a dollars and cents point of view.)

It is not necessary to go beyond the rationale of the decision in the last case decided under the establishment of a religion clause of the First Amendment to demonstrate that the First Amendment is flouted in the provisions of the Income Tax laws which are quoted above. *Engle* v. *Vitale*, 370 U. S. 421.

Other cases like *Vitale* follow: *McCallum* v. *Board of Education*, 333 U. S. 203; *Everson* v. *Board of Education*, 330 U. S. 1; *McGowan* v. *Maryland*, 366 U. S. 420 (dissent at page 563).

Here, it is too plain for debate that the man who has a taxable income of over $600 per year and who wants to contribute to a church within his resources may contribute fifty dollars to it, knowing he will obtain a tax benefit of

ten dollars, so in essence he is contributing only forty dollars. Thus, the Government contributes ten dollars to his church. More significantly, if a man with a taxable income of over two hundred thousand dollars per year contributes ten thousand dollars to his church, all of this contribution may ultimately come out of his pocket is nine hundred dollars and the Government pays the remaining $9,100, not by check but by "grace."

It ought to be obvious that if, as is the fact, the Federal Government is expressly prohibited from making a grant toward the expenses of building a church, it ought not be able to effectuate the same end through the medium and subterfuge of a tax law.

Since the prohibition of the "establishment of a religion" concept was so dear to the hearts of those who founded this nation, and since the economic effect of the provisions of the Income Tax Laws shown above is so great, it does not seem conceivable that this concept could be circumvented by an Income Tax Law. In passing on constitutional questions our Supreme Court has always looked to substance and not to form.

But there is a greater vice in these provisions.

Left to the determination of the Secretary of the Treasury is the question of: What is a religion? Would he have included the "I Am" religion? The Supreme Court did.

Enough was said in the *Vitale* case referred to above to demonstrate the dangers of leaving to civil authority this type of determination.

Of course, it goes without any need for delineation that the exclusion of the value of occupying a home as a parsonage is in derogation of the "establishment of a religion" clause. The value of the home which would be income to anyone other than minister of the Gospel but not to him.

These unconstitutional provisions in the Income Tax Laws are sufficient to denounce the entire Income Tax Laws

because it is an inseparable part of the terms of the law, taken as a whole, and one of such quantitative significance as to denounce all of the remaining sections of the Income Tax Laws.

E.

PETITIONER UNIFORMLY NOW COMES TO THE QUESTION OF WHETHER THE INCOME TAX LAWS VIOLATE ARTICLE III SECTION 8 OF THE CONSTITUTION..

Certain it is that considered geographically the uniformity required in the exactment of excise that is broken down wherever the Section 931 of the Internal Revenue Code surely violates Art. III, Section 8 of the Constitution.

In certain instances it cut down the base on which every person, who meets with situation described in that Section has a base for taxation purposes which is less than that on the ordinary taxpayer.

Obviously Puerto Rico and the Virgin Islands are a part of the United States, and governed by Article III, Section 8. Section 931 breaks down the uniformity which is required by the Constitutional provisions. This applies also in Internal Revenue Code Section 7653.

It remains for the Island of Guam to show the extent to which our possessions go to break down this Constitutional provision. By the terms of U. S. C. Title 48, Section 1421, and Section 1421(i).

There the Government of Guam adopted the income tax laws of the United States. There also it made provision that all taxes collected from income taxes should be covered into the Treasurer of Guam and be used for it and it alone.

In short, the excise taxes collected for the common defense and general welfare of the United States should be used for Guam and no other place in the United States or elsewhere. Surely that is in violation of Article III, Section 8.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted and the decisions of the United States Court of Appeals for the Seventh Circuit and of the Tax Court of the United States entered below, should be vacated and set aside or, in the alternative other and further appropriate remedy and relief should be afforded and granted petitioners.

Respectfully submitted,

JOHN O'C. FITZGERALD,
10 S. LaSalle Street,
Chicago, Illinois 60603,
CEntral 6-2222,
Counsel for Petitioners.

CERTIFICATE OF SERVICE.

I hereby certify that a true copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit was served this ..... day of August, 1966, upon the following persons by depositing four copies of same addressed to each in the United States mail with sufficient air mail postage prepaid:

HONORABLE NICHOLAS D. B. KATZENBACH,
Attorney General of the United States,
United States Department of Justice,
Washington, D. C. 20530.

HONORABLE THURGOOD MARSHALL,
Solicitor General,
United States Department of Justice,
Washington, D. C. 20530.

HONORABLE MITCHELL ROGOVIN,
Assistant Attorney General,
Tax Division,
United States Department of Justice,
Washington, D. C. 20530.

.....
Counsel for Petitioners.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND PERTINENT PARTS OF LOWER COURT RECORDS INVOLVED.

APPENDIX A.

U. S. Constitutional Provisions Involved:

1. Article I, Section 8:

"The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

"* * *

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Article I, Section 2, Clause 5. Impeachment Power.

"The House of Representatives shall choose their Speaker and other Officers; and shall have the sole Power of Impeachment."

Article I, Section 3, Clause 6. Trial of Impeachment.

"The Senate shall have the sole Power to try all impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. * * * And no Person shall be convicted without the Concurrence of two thirds of the Members present."

Article I, Section 3, Clause 7. Judgment in cases of impeachment; punishment on conviction.

"Judgment in cases of impeachment shall not extend further than to removal from office, and disquali-

fication to hold and enjoy any office of honor, Trust or Profit under the United States, but the Party convicted shall nevertheless be liable and subject to indictment, Trial, Judgment and Punishment according to Law."

2. Article III, Section 1: Judicial Power.

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Comepnsation, which shall not be diminished during their Continuance in Office."

3. Article III, Section 2: Clauses 1 and 4: Extension of Judicial Power:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * * to Controversies to which the United States shall be a Party; * * *."

4. Amendment I. Freedom of Religion; Petition of Grievances.

"Congress shall make no law respecting an establishment of religion, or permitting the free exercise thereof; * * * or the right of the people * * * to petition for a redress of grievances."

5. Amendment V.

"No person * * * shall be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

6. Amendment VII. Right of Trial by Jury.

"In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial

by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the common law."

7. Amendment IX. Retention of Rights by People.

"The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

8. Amendment XVI. Power to Lay and Collect Income Taxes.

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment; among the several States, and without regard to any census or enumeration."

Statutes:

1. 28 U. S. C. Section 1346(a)(1):

"(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

2. 28 U. S. C. Section 2402:

"Any action against the United States under section 1346 shall be tried by the court without a jury, except that any action against the United States under 1346(a)(1) shall, at the request of either party to such action, be tried by the court with a jury."

3. 28 U. S. C. Section 1355:

"The district courts shall have original jurisdiction, * * *, of any action or proceeding for the recovery or enforcement of any * * *, penalty, * * *, pecuniary or otherwise, incurred under any Act of Congress."

4. 28 U. S. C. Section 134:

"(a) The district judges, * * *, shall hold office during good behavior."

5. 28 U. S. C. Section 136:

"(a) In each district having more than one judge the district judge senior in commission shall be the chief judge of the district court.

"(b) The chief judge shall have precedence and preside at any session which he attends.

"Other district judges shall have precedence and preside according to the seniority of their commissions. Judges whose commissions bear the same date shall have precedence according to seniority in age."

6. 28 U. S. C. Section 144:

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in form of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

"The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

Judicial Code (Court of Claims):

7. 28 U. S. C. Section 171:

"The President shall appoint by and with the advice and consent of the Senate, a chief judge and four associate judges who shall constitute a court of record known as the United States Court of Claims.

"Such court is hereby declared to be a court estab-

lished under Article III of the Constitution of the United States."

8. 28 U. S. C. Section 172:

"The chief judge of the Court of Claims shall have precedence and preside at any session of the court which he attends.

"The other judges shall have precedence and preside according to the seniority of their commissions. (Judges whose commissions bear the same date shall have precedence according to seniority in age.)"

Internal Revenue Code:

1. 26 U. S. C. Section 7441:

"The Board of Tax Appeals shall be continued as an independent agency in the Executive Branch of the Government, and shall be known as the Tax Court of the United States. The members thereof shall be known as the chief judge and the judges of the Tax Court."

2. 26 U. S. C. Section 7442:

"The Tax Court and its divisions shall have such jurisdiction as is conferred on them by this title, by chapters 1, 2, 3 and 4 of the Internal Revenue Code of 1939, by title II and III of the Internal Revenue Act of 1926 (44 Stat. 10-87), or by laws enacted subsequent to February 26, 1926."

3. 26 U. S. C. Section 7443:

"(a) Number.—The Tax Court shall be composed of 16 members.

"(b) Appointment.—Judges of the Tax Court shall be appointed by the President, by and with the advice and consent of the Senate, solely on the grounds of fitness to perform the duties of the office.

"(e) Term of office.—The terms of office of all judges of the Tax Court shall expire 12 years after the expiration of the terms for which their predecessors

were appointed; but any judge appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the unexpired term of his predecessor.

"(f) Removal from office.—Judges of the Tax Court may be removed by the President, after notice and opportunity for public hearing for inefficiency, neglect of duty, or malfeasance in office, but for no other cause."

4. 26 U. S. C. Section 7444:

"(a) Seal.—The Tax Court shall have a seal which shall be judicially noticed.

"(b) Designation of chief judge.—The Tax Court shall at least biennially designate a judge to act as chief judge.

"(c) Divisions.—The chief judge may from time to time divide the Tax Court into divisions of one or more judges, assign the judges of the Tax Court thereto, and in case of a division of more than one judge, designate the chief thereof. If a division, as a result of a vacancy or the absence or inability of a judge assigned thereto to serve thereon, is composed of less than the number of judges designated for the division, the chief judge may assign other judges to the division or direct the division to proceed with the transaction of business without awaiting any additional assignment of judges thereto.

"(d) Quorum.—A majority of the judges of the Tax Court or of any division thereof shall constitute a quorum for the transaction of the business of the Tax Court or of the division, respectively. A vacancy in the Tax Court or in any division thereof shall not impair the powers nor affect the duties of the Tax Court or division nor of the remaining judges of the Tax Court or division, respectively. August 16, 1954, 9:45 a.m., E. D. T., c. 736, 68A Stat. 880."

5. 26 U. S. C. Section 6215 (a):

"(a) General rule.—If the taxpayer files a petition

with the Tax Court, the entire amount redetermined as the deficiency by the decision of the Tax Court which has become final shall be assessed and shall be paid upon notice and demand from the Secretary or his delegate but disallowed as such by the decision of the Tax Court which has become final shall be assessed or be collected by levy or by proceeding in court with or without assessment."

6. 26 U. S. C. Section 7421:

"Tax.—Except as provided in sections 6212(a) and (c), and 6213, (a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

7. 26 U. S. C. Section 7422:

"(a) No suit prior to filing claim for refund.—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof.

"(b) Protest or duress.—Such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress.

"(c) Suits against collection officer a bar.—A suit against any officer or employee of the United States (or former officer or employee) or his personal representative for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in manner wrongfully collected shall be treated as if the United States had been a party to such suit in applying the doctrine of res judicata in

all suits instituted after June 15, 1942, in respect of any internal revenue tax, and in all proceedings in the Tax Court and on review of decisions of the Tax Court where the petition to the Tax Court was filed after such date.

"(d) Credit treated as payment.—The credit of an overpayment of any tax in satisfaction of any tax liability shall, for the purpose of any suit for refund of such tax liability so satisfied, be deemed to be a payment in respect of such tax liability at the time such credit is allowed.

"(e) Stay of proceedings.—If the Secretary or his delegate prior to the hearing of a suit brought by a taxpayer in a district court or the Court of Claims for the recovery of any income tax, estate tax, or gift tax (or any penalty relating to such taxes) mails to the taxpayer a notice that a deficiency has been determined in respect of the tax which is the subject matter of taxpayer's suit, the proceedings in taxpayer's suit shall be stayed during the period of time in which the taxpayer may file a petition with the Tax Court for a redetermination of the asserted deficiency, and for 60 days thereafter. If the taxpayer files a petition with the Tax Court, the district court or the Court of Claims, as the case may be, shall lose jurisdiction of taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of taxpayer's suit for refund. If the taxpayer does not file a petition with the Tax Court for a redetermination of the asserted deficiency, the United States may counterclaim in the taxpayer's suit, or intervene in the event of a suit as described in subsection (c) (relating to suits against officers or employees of the United States), within the period of the stay of proceedings notwithstanding that the time for such pleading may have otherwise expired. The taxpayer shall have the burden of proof with respect to the issues raised by such counterclaim or intervention of the United States except as to the issue of whether the taxpayer has been guilty of fraud with intent to evade tax. This subsection shall not apply to a suit by a taxpayer which, prior to the date

of enactment of this title, is commenced, instituted, or pending in a district court or the Court of Claims for the recovery of any income tax, estate tax, or gift tax (or any penalty relating to such taxes)."

8. 26 U. S. C. Sections 1, 11, 103, 167, 501, 611, 613, 911, 912, 1001, and 1201,—Federal Income Tax Act.

The Federal Income Tax Act, including the above designated sections, being voluminous and in pamphlet or booklet form available to the Court, and the Court being conversant therewith, petitioners merely refer to the same and respectfully ask the Court's indulgence to not require the printing thereof verbatim.

Federal Rules of Civil Procedure:

1. 28 U. S. C. Rule 8(a) of the Federal Rules of Civil Procedure:

"(a) Claims for relief. A pleading which sets forth a claim for relief whether an original claim * * * shall contain * * * (2) a short and plain statement of the claim showing that the pleader is entitled to relief, * * *."

"(b) Defenses. Form of Denials. A party shall state in short and plain terms his defense to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied.

"(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively * * * any * * * matter constituting an avoidance or affirmatively defense.

"(d) Effect of Failure to Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in a responsive pleading.

"(e) Pleading to Be Concise and Direct.

"Consistency. (1) Each averment of a pleading

shall be simple, concise and direct. No technical forms of pleading or motions are required.

"(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice."

Tax Court Rules of Practice:

Rule 7, Paragraphs (a), (1), (2), (c)(2)(4), (B)(5), of the Tax Court "Petition":

1. "(a) Petition:

(1) Filing—A case shall be initiated by filing with the Court a petition * * *.

(2) Improper petition—Dismissal—Failure of a petition to comply with this Rule * * * shall be grounds for dismissal of the case.

"(c) Form of petition—

(4) The petition shall contain:

(B) Numbered paragraph stating:

"5. Clear and concise lettered statements of the facts upon which petitioner relies as sustaining the assignments of error, except those assignments of error in respect of which the burden of proof is placed upon the Commissioner."

2. Rule 14. Answer:

"(b) Form of answer. The answer shall be drawn so that it will advise the petitioner and the Court fully of the nature of the defense. It shall contain a specific admission or denial of each material allegation of fact contained in the petition and a statement of any facts upon which the Commissioner relies for defense or for affirmative relief or to sustain any issue raised in the petition in respect of which issue the burden of proof is, by statute, placed upon him. Paragraphs of the answer shall be numbered to correspond to those of the petition to which they relate * * *."

3. Rule 17(c). Amended and Supplemental Pleadings—Ordered by Court.

"(c) Amendment ordered—

(1) Occasion for—The Court may, upon its own

motion, or upon motion of either party showing good cause filed prior to the setting of the case for trial, may order a party to file a further and better statement of the nature of his claim, of his defense, or of any matter stated in any pleading. Such a motion filed by a party shall point out the defects complained of and the details desired."

4. Rule 18 of the Tax Court. Admissions and denials of pleaded facts:

"(a) Effect of answer—Every material allegation of fact set out in the petition and not expressly admitted or denied in the answer, shall be deemed to be admitted."

5. Rule 19—Motions:

"(2) Motions will be acted upon as justice may require * * *."

6. Rule 21. Dismissal:

"A case may be dismissed for cause upon motion of either party or of the Court."

7. Rule 26. Place of Trial—Requests and Designation:

"(a) Requests for place of trial—

"The petitioner at the time of filing the petition shall also file a request showing the name of the place where he would prefer the trial to be held. * * *

"(c) Designation of place of trial—

"The Court will designate the place of trial in accordance with the statutory provision that the time and place of trial shall be fixed 'with as little inconvenience and expense to taxpayers as is practicable,' * * *."

8. Rule 27 of the Tax Court. Place, Time and Notice of Hearing and Trials—Attendance and Continuances:

"(a) Calendars of hearing on motions and other procedural and subsidiary matters—

(1) If it is necessary for the Court to hear the

parties on motions other than the merits, the proceeding will be listed for such hearing on a motion calendar which is called in Washington, D. C., unless good cause for holding the hearing elsewhere is shown in a timely motion to the Court, * * *."

9. Rule 40 of the Tax Court. Transcript Proceedings:

"Hearings or trials before the Court or its Division shall be stenographically reported and a transcript thereof shall be made if, in the opinion of the Court, or of the Division conducting the hearing or trial, a permanent record is deemed necessary. Transcripts shall be supplied to the parties and to the public by the official reporter at such rates as may be fixed by contract between the Court and the reporter."

APPENDIX B.

Showing Proceedings Had In the Court of Appeals.

IN THE UNITED STATES COURT OF APPEALS,
FOR THE SEVENTH CIRCUIT.

Tax Court Docket No. 3864-64.

PETER S. PEDERSEN, SR. and MARION D. PEDERSEN,
Petitioners on Review,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.
} No. .....

PETITION FOR REVIEW OF DECISION OF THE TAX COURT OF THE UNITED STATES.

To: *The Honorable Judges of the United States Court of Appeals for the Seventh Circuit.*

Peter S. Pedersen, Sr. and Marion D. Pedersen, the petitioners in this cause, by John Q'C. FitzGerald, their counsel, hereby file their Petition for the Review by the United States Court of Appeals for the Seventh Circuit of the decision of the Tax Court of the United States, entered March 19, 1965, Tax Court Docket No. 3864-64.

1. Dismissing the case for failure properly to prosecute on the ground that the petition does not, in important stated particulars, comply with Rule 7 of the Rules of this Court; and

2. Affirming respondent's determining a deficiency in petitioners' Federal Income Tax and Penalties, for the taxable years:

(a) ended December 31, 1957, tax in the amount of $12,644.34, with negligence penalty under 1954 Code, Section 6653(a) of $632.22; and

(b) ended December 31, 1959, tax in the amount of $22,437.39, with negligence penalty under 1954 Code, Section 6653(a) of $1,021.87; and

(c) ended December 31, 1960, tax in the amount of $12,762.82, with negligence penalty under 1954 Code, Section 6653(a) of $638.14; and

(d) ended December 31, 1961, tax in the amount of $10,563.80, with negligence penalty under 1954 Code, Section 6653(a) of $528.19.

3. Thereby, sustaining respondent's motion in substance and to the effect that the petition filed by petitioners in the Tax Court appealing from said determination of alleged Federal Income Taxes and Deficiencies "failed to conform to Rule 7(c) of the Tax Court's Rules of Practice" in that:

(a) "it fails to set forth a clear and concise statement of the facts upon which petitioners rely as sustaining the assignments of error"; and

(b) "In fact, the petition fails to allege any facts stating that it is impossible to present facts because the corporate books and records of the MPH Manufacturing Corporation and the Wonder Building Corporation of America have been destroyed, overruling petitioners' objections, answer and suggestions to respondent's said motion to dismiss; and

4. Affirming respondent's said determination of alleged deficiencies of Federal Income Taxes and Penalties; and

5. Thereby, by implication, denying petitioners countermotion to:

(a) Furnish petitioners, at their expense, with a certified copy of the transcript of any and all proceedings before the Tax Court at the time of the hearing of said respond-

ent's motion to dismiss the case, etc., and at the time of any and all continued hearings of said respondent's motion, because neither petitioners, nor any attorney or representative thereof, were present at any of said hearings all had at Washington, D. C., and necessary to enable petitioners and their attorney to determine whether to amend their said petition filed in the Tax Court appealing from said determination of and by respondent, or other action in and about the premises; and

(b) Amend said petition filed, as aforesaid, with the Tax Court.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

SEPTEMBER TERM, 1965 JANUARY SESSION, 1966.

No. 15270
EDWARD MARTIN AND PATRICIA MARTIN,
Petitioners,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 15271
PETER S. PEDERSEN, SR., AND MARION D. PEDERSEN,
Petitioners,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

No. 15272
PETER S. PEDERSEN, SR.,
Petitioner.
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petitions for Review of the Decisions of the Tax Court of the United States.

MARCH 18, 1966.

Before HASTINGS, *Chief Judge,* and CASTLE and SWYGERT, *Circuit Judges.*

CASTLE, *Circuit Judge.* The petitioners in these consolidated cases seek reversal of orders of the Tax Court which

dismissed their respective petitions for redetermination of income tax deficiencies and penalties asserted by the respondent Commissioner of Internal Revenue. The notices of deficiencies embrace the calendar years 1957 to 1961 inclusive. The Tax Court granted motions to dismiss grounded on the petitioners' failure to properly prosecute. The Commissioner had filed such a motion in each of the cases under Rule 7(a)(2) of the Rules of Practice, Tax Court of the United States (26 U. S. C. A.). The motion asserted that the petitioners had failed to set forth a clear and concise statement of the facts upon which the petitioners relied to sustain the errors assigned, and therefore the petition failed to conform to the requirements of Rule 7(c) of said Rules of Practice. Prior to the entry of the orders of dismissal the petitioners had been afforded, during a six-month period, three extensions of time in which to file amended petitions, but no amendment was filed. The orders of dismissal sustain the deficiencies and penalties as determined by the Commissioner.

Petitioners' claim of error and consequent right to the relief they seek of this Court, on review, is grounded on their contentions that (1) the Tax Court of the United States is without valid authority or existence, but represents an unconstitutional attempt by Congress to interfere with, and infringe upon, the rights, duties and functions of the judicial branch of the government in violation of Section 1 and 2 of Article III of the Constitution of the United States; (2) their petitions in the Tax Court assert that the facts upon which they rely as the basis for the errors claimed to exist in the Commissioner's determinations are impossible of presentation because, as petitioners are reliably informed and believe, *certain* of the books and records of the M. P. H. Manufacturing Corporation, which has been adjudged a bankrupt, have been lost, destroyed, or commingled with other records and are un-

available; and (3) in any event, their Tax Court petitions gave sufficient notice of the alleged errors claimed with respect to the deficiencies asserted.

The Tax Court of the United States, statutorily designated as "an independent agency in the Executive Branch of the Government" (26 U. S. C. A. § 7441) is created to provide an administrative forum in which a taxpayer may at his option secure a redetermination of his tax liability without prior payment of any deficiency asserted against him, and its decisions and orders are subject to judicial review. *Old Colony Trust Company* v. *Commissioner*, 279 U. S. 716; *Flora* v. *United States*, 362 U. S. 145. A taxpayer may elect, as the petitioners did, to invoke the jurisdiction of this administrative forum rather than first pay the tax liability asserted and then sue in district court for a refund. In neither event does the procedure afforded deprive the taxpayer of ultimate recourse to the courts for proper judicial redress or impinge upon the judicial function reserved to the courts established and authorized by Article III of the Constitution. Not only does petitioners' contention that the Tax Court is without valid constitutional existence lack substance and merit, but it is also inconsistent with the relief sought. Petitioners seek in the alternative either a reversal and remandment for the purpose of requiring the tribunal they claim to be without valid existence to exercise jurisdiction to permit them to amend their petitions at this belated stage of the proceeding, or a reversal and remandment for the purpose of requiring that tribunal to permit petitioners to proceed to a hearing before it on the merits on the petitions in their present form. Their additional suggestion that if we conclude that the Tax Court is constitutionally infirm we permit amendments to the Tax Court petitions to be filed in this Court is wholly devoid of merit. It is obvious that the lack of a

Tax Court would not, in any event, vest this Court with jurisdiction to hear and determine the matters on their merits.

Except that different taxpayers-shareholders of the M. P. H. Manufacturing Corporation, and two additional taxable years, are here involved, the material facts[1] and the legal criteria pertinent to a determination of the validity of petitioners' two remaining contentions, upon which they predicate claims of Tax Court error, are substantially identical with those considered and adjudicated by this Court in its recent decision in *Waldweiler* v. *Commissioner*, 7 Cir., 351 F. 2d 587. As to these phases of petitioners' cases *Waldweiler* represents the law of this Circuit, is a controlling precedent, and is fully dispositive of the petitioners' contentions. The orders of the Tax Court are therefore affirmed.

ORDERS AFFIRMED.

1. Here, as in *Waldweiler*, counsel for the Internal Revenue Service made averments, undenied by petitioners, with respect to the existence and availability of the corporate books and records.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Friday, March 18, 1966.

Before

Hon. John S. Hastings, Chief Judge;
Hon. Latham Castle, Circuit Judge;
Hon. Luther M. Swygert, Circuit Judge.

EDWARD MARTIN AND PATRICIA MARTIN, PETER S. PEDERSEN, SR., AND MARION D. PEDERSEN, PETER S. PEDERSEN, SR., No. 15270, 71, 72 *Petitioners,* *vs.* COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Petitions for Review of Decisions of the Tax Court of the United States.

This cause came on to be heard on the transcript of the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the decisions of the Tax Court of the United States entered in this cause on March 19, 1965, be, and the same are hereby, Affirmed, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS,
For the Seventh Circuit,
Chicago, Illinois 60610.

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that

the foregoing printed pages contain a true copy of opinion filed March 18, 1966 and judgment entered March 18, 1966.

Cause No. 15270-1-2.

Edward Martin and Patricia Martin et al. *vs.* Commissioner of Internal Revenue as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this Sixth day of June A.D. 1966.

KENNETH J. CARRICK,
(SEAL) *Clerk of the United States Court of Appeals for the Seventh Circuit.*

APPENDIX C.

Showing Proceedings Had Prior to Proceedings in the Court of Appeals.

Petitions in the Tax Court:

Petition of Edward and Patricia Martin:

THE TAX COURT OF THE UNITED STATES.

EDWARD MARTIN and PATRICIA MARTIN, husband and wife, *Petitioners,* *vs.* COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Docket No. 3863-64.

PETITION.

The above-named Petitioners hereby appeal from the determination of the Commissioner of Internal Revenue in the Notice of Deficiencies dated May 7, 1964, and as the basis for the proceedings alleges as follows:

1. Petitioners are Edward Martin and Patricia Martin, husband and wife, 565 East Park, Elmhurst, Illinois. It is conceptually like the other petitions and in all important matters here is exactly like the other petitions.

2. The Deficiency Letter was received by the Taxpayer without dated postmark or any indication of date of mailing other than stamped endorsement "Certified Mail No. 672155," a copy of which Letter, marked Exhibit "A" being attached hereto and made a part hereof.

3. The returns for the periods involved were filed with the District Director of Chicago, Illinois.

4. The taxes in controversy are income taxes and claimed deficiencies and claimed negligence and delinquence penalties for the taxable years: (a) ended December 31, 1957 in the amount of $8,011.26 and a negligence penalty under 1954 Code, section 6653(a) of $400.56; and (b) ended December 31, 1958 in the amount of $8,297.33 and a negligence penalty under 1954 Code, section 6653(a) of $414.87; and (c) ended December 31, 1959 in the amount of $13,469.28 and a negligence penalty under 1954 Code, section 6653(a) of $673.46; and (d) ended December 31, 1960 in the amount of $5,588.61 and a negligence penalty under 1954 Code, section 6653(a) of $552.95 and a delinquency penalty under 1954 Code, section 6651 of $1,397.15, and an estimated tax penalty under 1954 Code, section 6654 of $90.84; and (e) ended December 31, 1961 in the amount of $4,271.60 and a negligence penalty under 1954 Code, section 6653(a) of $487.10, and a delinquency penalty under 1954 Code, section 6651 of $1,067.90, and an estimated tax penalty under 1954 Code, section 6654, of $53.96. The attached statement shows the computation of the claimed deficiencies and penalties.

5. Petitioners allege and state that Respondent erred in determining the Tax Liability and Penalties against Petitioners for each of the calendar years 1957, 1958, 1959, 1960 and 1961, as stated and detailed in pages 1 through 8 and Exhibits "A" and "B" of the Statement attached to the Notice of Deficiency, for the reason that:

(a) Each and every of the disallowed items were in fact substantially, properly and accurately and realistically substantiated by Petitioners, and were in fact paid and were allowable deductions under the 1954 Code and applicable sections, rules and regulations thereof; and

(b) Returns for the calendar years 1960 and 1961 were not filed within the time prescribed by law because the duly licensed and practicing certified public accountant duly registered as such with the Internal Revenue Service engaged by Petitioners was unable to complete Petitioners' returns on time and Petitioners, relying on said certified public accountant to well and timely prepare and file said returns, was unable to timely file the same; and, therefore, no 25% penalty under section 6651 of the 1954 Code, or otherwise, should be assessed against Petitioners in and about the premises; and

(c) Additional income assessed as dividends received should not be so assessed because each and all of the several questioned items and amounts were corporate and not personal expenditures and were for the benefit of the respective corporation and not personal to Petitioners or either of them, and

(d) Saf-All Installation Company actually existed as a business company, and Petitioners actually paid the several amounts for the uses and purposes stated in or shown by their returns, and the same were properly allowable and deductible under 1954 Code and applicable sections thereof and IRS Rules and Regulations with respect thereto; and

(e) Bloc-Loc, Inc. items and amounts as shown in the return factually and actually constituted a loss as Bloc-Loc, Inc. was forced to discontinue the use of its name because of prior use by another corporation, and became non-existent and without funds or property; and

(f) Recording Company investment items and amounts were actually paid by Petitioners for the uses and purposes stated in or shown by the returns; and

(g) Claimed increased capital gains in the amount of $10,777.61 for the year 1959, due to disallowance of short-term capital losses of $15,400.00 because, as Respondent

claims, Petitioners did not establish any portion of said amount to be deductible; and

(h) As well as in each and every item and detail, going to make up Respondent's Computation of Tax, other than as shown by Petitioners' return

* * * * * *

all of which errors are shown in and by Petitioners' returns for said calendar years, respectively, and were substantiated by facts to be proper, accurate and realistic by determination of a duly licensed and practicing certified public accountant duly registered with the Internal Revenue Service, who prepared and filed said Petitioners' returns for the calendar years 1957 through 1961.

* * * * *

6. The facts upon which Petitioners rely, other than the ultimate facts stated herein, as a basis of these proceedings is imposible to present because:

(a) Said MPH Manufacturing Corporation and Wonder Building Corporation has been adjudged a bankrupt and Petitioners are reliably informed and believe, and therefore state the fact to be, that certain of said corporate books, records, belongings and effects have been

(a-1) destroyed and/or irreparably damaged by unavoidable fire; and

(b) lost and/or misplaced while, and caused by, loss of lease of premises occupied by said corporation, and Writ of Restitution Proceedings brought by Lessor; and

(c) incapable of obtaining because of commingling and inadequate cataloging of large volumes of said books, records, belongings and effects, not destroyed by fire or otherwise lost or misplaced.

7. Petitioners in support of their contentions and position, as stated in and shown by these proceedings state the following propositions of law:

(a) Not only the substance but the realistics of the transaction or situation must be looked to in and about the premises.

(b) Before penalties such as Respondent has claimed in his said Notice, Exhibit "A" made a part hereof, the basis or grounds therefor must be established by clear and convincing evidence, regardless of the Court in which the proceeding is maintained.

I. R. C. Par. 7454;
Ohlinger v. *U. S.* (10 Cir. 1955), 219 F. (2d) 310.

(c) Even if Petitioners' records were or are inadequate for precise and complete verification of their returns, this fact does not justify Respondent, in determining the income, upon a basis which gives results absurd on their face.

WHEREFORE, these Petitioners pray that this Court may hear the proceedings preferably at Chicago, Illinois, and find that Petitioners do not owe the alleged deficiency assessed by the Commissioner of Internal Revenue in his Notice of Deficiency dated May 7, 1964.

And the Petitioners further pray that the Court may try the case preferably at Chicago, Illinois, and grant such other and further relief in and about the premises as is fit and proper.

EDWARD MARTIN,
PATRICIA MARTIN,
Husband and wife.

ENROLLED TAX COURT OF U. S.

JOHN O'C. FITZGERALD,
10 South La Salle Street,
Chicago, Illinois 60603,
CEntral 6-2221,
Attorney for Petitioners.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

Edward Martin and Patricia Martin, husband and wife, first being separately duly sworn, on oath depose and say that they are the Taxpayers above named; that they have read the foregoing Petition or had the same read to them, and are familiar with the statements contained therein, and that the facts stated therein are true, except as to those facts stated to be upon information and belief and those facts they believe to be true.

EDWARD MARTIN,
PATRICIA MARTIN,
Husband and wife.

Subscribed and Sworn to before me this 3rd day of August, 1964.

MILDRED C. RANKIN,
Notary Public.

(SEAL)

Respondent's Motion to Dismiss for Failure to Prosecute:

TAX COURT OF THE UNITED STATES.

EDWARD MARTIN and PATRICIA MARTIN,
Petitioners,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
} Docket No. 3863-64.

MOTION TO DISMISS FOR FAILURE TO PROPERLY PROSECUTE.

The Respondent Moves, under Rule 7(a)(2) of this Court's Rules of Practice, that the court dismiss this proceeding for failure to properly prosecute and determine that there is a deficiency in income tax and penalty due from the petitioners for the taxable year 1957 in the amounts of $8,011.26 and $400.56, respectively; that there is a deficiency in income tax and penalty for the taxable year 1958 in the amounts of $8,297.33 and $414.87, respectively; that there is a deficiency in income tax and penalty for the taxable year 1959 in the amounts of $13,469.28 and $673.46, respectively; that there is a deficiency in income tax for the taxable year 1960 in the amount of $5,588.61 and penalties in the amount of $552.95, $1,397.15 and $90.84, respectively; that there is a deficiency in income tax for the taxable year 1961 in the amount of $4,211.60 and penalties of $487.10, $1,067.90 and $53.96, respectively.

In Support Thereof, the respondent respectfully shows unto the Court:

1. The petition fails to conform to Rule 7(c) of the Tax Court's Rules of Practice in that it fails to set forth a clear and concise statement of the facts upon which petitioners reply as sustaining the assignments of error. In fact, the

petition fails to allege any facts stating that it is impossible to present facts because the corporate books and records of the MPH Manufacturing Corporation and the Wonder Building Corporation of America have been destroyed, damaged, lost or misplaced. See paragraph 6 of the petition.

2. Respondent has contacted the office of the Clerk of the United States District Court for the Northern District of Illinois and has learned that the cases of In the Matter of MPH Manufacturing Corporation, Bankrupt Docket No. 62 B 3109 and In the Matter of the Wonder Building Corporation of America, Bankrupt Docket No. 62 B 5669, have not been closed; that the books and records of the Bankrupt Corporations are in the possession of Mr. Charles David Maley, 231 South LaSalle Street, Trustee in Bankruptcy and with the American Auction Associates, Inc., 12 North Halsted Street, Chicago, Illinois, and that such books and records are available for inspection.

WHEREFORE, respondent prays:

(a) The instant petition be dismissed for failure to properly prosecute.

(b) The Court enter its decision that there is a deficiency in income tax and penalty due from the petitioners for the taxable year 1957 in the amounts of $8,011.26 and $400.56, respectively; that there is a deficiency in income tax and penalty for the taxable year 1958 in the amounts of $8,297.33 and $414.87, respectively; that there is a deficiency in income tax and penalty for the taxable year 1959 in the amounts of $13,469.28 and $673.46, respectively; that there is a deficiency in income tax for the taxable year 1960 in the amount of $5,588.61 and penalties in the amounts of $552.95, $1,397.15 and $90.84, respectively; that there is a deficiency in income tax for the taxable year

1961 in the amount of $4,271.60 and penalties of $487.10, $1,067.90 and $53.96, respectively.

SHELDON S. COHEN,
Chief Counsel, Internal Revenue Service.

Of Counsel:
FRANK C. CONLEY,
Regional Counsel,
JAMES E. CALDWELL,
Attorney,
Internal Revenue Service,
Room 1622, 35 East Wacker Drive,
Chicago, Illinois 60601.

Tax Court Order of September 29, 1964:

TAX COURT OF THE UNITED STATES.
Washington.

EDWARD MARTIN and PATRICIA MARTIN, *Petitioners,* *vs.* COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Docket No. 3863-64.

ORDER.

The respondent on September 22, 1964, filed a motion to dismiss this case for failure properly to prosecute on the ground that the petition does not, in important stated particulars, comply with Rule 7 of the Rules of this Court. That motion indicates, in the absence of other facts, and on the present state of the record, that the petition on file does not comply with the Court's Rules and, accordingly, it is

ORDERED that this case be dismissed for failure properly to prosecute unless the petitioners, on or before October 27, 1964, file : (a) an amended petition complying with the Court's Rules, or (b) written objection to respondent's motion showing cause why this case should not be dismissed, in which event the Court will take further action as appropriate.

NORMAN O. TIETJENS,
Judge.

Dated: Washington, D. C.,
September 29, 1964.

Petitioners, Edward and Patricia Martin's Objections, Answer and Suggestions to Respondent's Motion to Dismiss:

TAX COURT OF THE UNITED STATES.

EDWARD MARTIN and PATRICIA MARTIN, husband and wife, *Petitioners*, *vs.* COMMISSIONER OF INTERNAL REVENUE, *Respondent*.	Docket No. 3863-64.

PETITIONERS' OBJECTIONS, ANSWER AND SUGGESTIONS TO RESPONDENT'S MOTION TO DISMISS PROCEEDING FOR FAILURE TO PROPERLY PROSECUTE.

Petitioners for their objections, answer and suggestions to Respondent's Motion to Dismiss for Failure to Properly Prosecute state the following:

1. Respondent's said motion does not conform with Rule 19 (Motions) of this Court, namely, Subparagraph (a) thereof, in that the said motion does not fully set forth the alleged reasons for the action sought.

2. The said motion is inadequate, insufficient and not in accord with proper practice and procedure for that it contends and states that the petition filed herein "fails to set forth a clear and concise statement of the facts upon which petitioner relies as sustaining the assignment of error," which is merely a general and conclusionary statement and is not specific as to any parts other than that

> "(a) the petition fails to allege any facts stating that it is impossible to present facts because the corporate books and records of the said MPH Manufacturing Corporation have been destroyed, damaged, lost or misplaced and that the Respondent has contacted the office of the Clerk of the United States District Court

for the Northern District of Illinois and has learned that the case of In the Matter of MPH Manufacturing Corporation, Bankrupt Docket No. 62 B 3109, has not been closed; that the books and records of the bankrupt are in the possession of Mr. Charles David Maley, 231 South LaSalle, Trustee in Bankruptcy, and with American Auction Associates, Inc., 12 North Halsted, Chicago, Illinois, and that such books and records are available for inspection,"

which merely creates an issue of fact in that Petitioners, in Paragraph 6 of their Petition (page 5 thereof) clearly state that "the facts upon which Petitioner-Taxpayer relies, other than the *Ultimate facts stated herein,* as the basis for these proceedings is impossible to present because:

"(a) said MPH Manufacturing Corporation has been adjudged a bankrupt and Petitioner-Taxpayer is reliably informed and believes, and therefore states the fact to be that *certain* of said corporate books, records, belongings and effects have been:

(a-1) destroyed and/or irreparably damaged by unavoidable fire, and

(a-2) lost and/or misplaced while and caused by loss of lease of premises occupied by said corporation and writ of restitution proceedings brought by lessor, and

(a-3) incapable of obtaining because of commingling and inadequate cataloging of large volumes of said books, records, belongings and effects not destroyed by fire or otherwise lost or misplaced;"

all of which allegations and statements have not and are not met by Respondent, as is self-evident from the reading of Paragraph 1 of Respondent's said Motion to Dismiss.

3. In considering and determining the merits of Respondent's said petitions to dismiss, all reasonable deductions and inferences in the petition as a whole must be treated and accepted as true; and this being the fact and the law, Respondent's Motion to Dismiss should be denied.

4. Further, the petition being properly verified, as required by Rule 7, Subparagraph (d) of this Court, Respondent's Motion to Dismiss, being directed to the allegations of the verified petition, likewise pursuant to good and proper pleading, practice and procedure, should be verified, which in the instant case, Respondent has failed to do, and, therefore, Respondent's Motion to Dismiss should for that reason be denied, or in the alternative, stricken and the Respondent required to answer the petition..

5. Further, from a reading of Respondent's said Motion to Dismiss, Paragraph 2 thereof, it is self-evident that the allegations with respect to the books and records of the bankrupt being in the possession of those named and that the same are available for inspection is not of Respondent's own knowledge, as there is no allegation of confirmaance by contact with the Trustee in Bankruptcy or with the American Auction Associates, Inc., nor is there any allegation that the entire books and records of the bankrupt are so in possession of those named; and there is no specific denial upon personal knowledge or reliable information and belief of Respondent that certain of said books and records prior to and at the time that Petitioners subscribed and verified their Petition and at the time of the filing thereof with this Court, that certain of said books, records, belongings and effects of the bankrupt had been destroyed and are irreparably damaged by unavoidable fire and were and are lost and are misplaced while and caused by loss of lease of premises occupied by said bankrupt and writ of restitution proceedings brought by lessor

and/or were and are incapable of being obtained because of commingling and inadequate cataloging of large volumes of said books, records, belongings and effects not destroyed by fire or otherwise lost or misplaced and, therefore, the allegations and statements with respect to certain of said corporate books, records, belongings and effects and all reasonable deductions and inferences therefrom and with respect thereto must be accepted for the purposes of considering and determining Respondent's Motion to Dismiss to be factually true.

6. These proceedings at the present stage are merely pleadings to create issues and it is not the purpose of nor is it proper for pleadings to contain evidentiary matter, the only proper purpose being to state allegations, apprising Respondent and this Court of Petitioners' position, contention and defense to the deficiency notice which Petitioners allege and state that the Petition does.

7. Furthermore, the decision of *Fisher, et al.* v. *Commissioner of Internal Revenue,* 149 F. 2d 540, 7 Cir. 1945, is in substance and to the effect that these proceedings should not be dismissed for failure to prosecute but that if the Petition be insufficient because "it does not state a clear and concise statement of the facts upon which Petitioners rely as sustaining the assignment of error", then Respondent's proper motion should be a motion to strike the Petition and, should this Court sustain such a motion, then the Petitioners should be afforded a reasonable time to amend their Petition.

JOHN O'C. FITZGERALD,
Attorney for Edward Martin and Patricia Martin, Petitioners.

JOHN O'C. FITZGERALD,
10 S. LaSalle Street,
Chicago, Ill. 60603,
CEntral 6-2221.

Tax Court Transcript of Proceedings of Hearing on November 28, 1954:

BEFORE THE TAX COURT OF THE UNITED STATES.

EDWARD MARTIN and PATRICIA MARTIN, PETER S. PEDERSEN, SR. and MARION D. PEDERSEN, PETER S. PEDERSEN, SR., *Petitioners,* vs. COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Docket No. 3863-64. Docket No. 3864-64. Docket No. 3865-64.

Courtroom No. 2,
Internal Revenue Building,
Washington, D. C.,
Wednesday, November 25, 1964.

Met, pursuant to notice at 10:00 a.m.

Before:

Honorable C. Rogers Arundell, Judge.

Appearances:

Andrew S. Coxe, Esq., on behalf of Respondent.

PROCEEDINGS.

The Clerk: Dockets 3863-64, 3864-64 and 3865-64, Edward Martin and Patricia Martin, and related petitioners.

Mr. Coxe: Andrew S. Coxe for respondent, Your Honor.

The Court: Is there an appearance for petitioner?

The Clerk: There seems to be none, Your Honor.

Mr. Coxe: If it please the Court, we are here this morning in these three dockets on identical motions by re-

spondent to dismiss this case for failure to properly prosecute by reason of the non-compliance in the petitions, and they are likewise identical, Your Honor, to comply with Rule 7 in respect to setting forth a clear and concise statement of facts upon which the petitioners rely in support of their assignments of error.

There are in fact no facts stated at all, Your Honor, in these petitions. In brief, the petitioners state that the records of the corporation called MPH Corporation and another corporation, the Wonder Manufacturing Company, I believe, were either destroyed or unavailable by reason of the bankruptcy of the corporations, and for other reasons.

However, at the moment I am a little bit ahead of myself. I think I should lead up to an explanation of this particular portion of the petitions. Your Honor, in these cases three notices of deficiency were all issued on May 7, 1964, covering the years 1957 through 1961. In the first docket, Edward Martin and wife, the years 1957 through 1961 there were deficiencies and penalties determined under Section 6653 (a), the negligence section, for all four years. There were also some minor penalties for the last two years under Sections 6654 and 6651, I believe. The total deficiencies here were some forty-four or forty-five thousand dollars.

In the other cases, a Mr. Pedersen and his wife, two deficiency notices were issued, one of them covering 1957 and 1959 through 1961. That was a notice issued to the husband and wife. In the other case where the notice was issued to him alone this covered the year 1958.

Now, your Honor, the principal and most substantial adjustments in all three of these cases involves the amounts paid to Mr. Martin or Mr. Pedersen or on their behalf, or for their benefit, whereby the MPH Manufacturing Com-

pany which respondent has included in petitioner's income, as being dividends from this corporation.

The Court: Did the corporation liquidate?

Mr. Coxe: It apparently did, Your Honor. Frankly, I don't have the entire chronology either in my file, nor does the petition show it, but apparently they went into receivership or bankruptcy proceedings. This seems to be what happened.

The Court: Did it end up afterward with some assets?

Mr. Coxe: Well, Your Honor, all that I am able to state is that prior to its liquidation these distributions were made.

The Court: These were made prior to the bankruptcy proceeding?

Mr. Coxe: That's correct, Your Honor. These adjustments, as I stated, in the petition in the portion devoted to facts, these are the only adjustments that petitioner speaks of, namely, the corporations and the distributions from it. However, in both cases, I mean in all three cases a number of other substantial adjustments which do not appear to be represented to the corporations which are not taken up at all, the error is assigned to respondent's computations, but there are no facts given.

The Court: Didn't they allege any facts at all?

Mr. Coxe: No, Your Honor. As I stated, the petitions are identical. What they state as facts are in paragraph six, Your Honor, of the respective petitions. Here is what they say:

"Facts upon which petitioners rely, other than the ultimate facts stated herein as a basis of these proceedings is impossible to present, because (a) said MPH Manufacturing Corporation, and Wonder Building Corporation have been adjudged bankrupt, and petitioners are reliably in-

formed and believe and therefore state the facts to be that certain of said corporations' books, records, belongings and effects have been (a) 1. destroyed or irreparably damaged by an unavoidable fire, and (b) lost and/or misplaced while and caused by loss of premises occupied by said corporation and right of restitution proceedings brought by lessor, and (c) incapable of obtaining because of commingling and inadequate cataloguing of large volumes of said books, records, belongings, and effects not destroyed by fire or otherwise lost or misplaced."

This is the only paragraph in this petition dealing with facts, and I was stating to the Court there are a number of other substantial adjustments in the notices of deficiency which are not even taken up at all, and are apparently not related to the activities of these corporations. For example, in the case of Mr. Martin, the lowest docket number, for the year 1959 a non-business bad debt loss of fifteen thousand four hundred dollars was disallowed. Again, in his case additional salary of thirty-six thousand four hundred dollars for 1961 was added to his income. In the case of Mr. Pedersen—these are just examples of other adjustments, your Honor, that are apparently unrelated to the corporate activities—casualty loss of some six thousand dollars as a result of flood was disallowed in 1957 I believe. In 1961 a seventeen thousand six hundred dollar non-business bad debt claim was disallowed. These are not treated in the petitions at all.

This, Your Honor, is simply to illustrate the further inadequacy of this petition. Now, relating to the particular and principal adjustments, namely, the receipt of dividends from MPH Corporation and Wonder Building Corporation by the way, Your Honor, can be practically disregarded. The additions to income there are insignificant. In our motion it is stated, and this is the principal basis for it, that

the respondent has contacted the office of the Clerk of the U. S. District Court for the Northern District of Illinois, and has learned that the cases in the matter of MPH Manufacturing Corporation, Bankrupt Docket Number 62B3109, and in the matter of the Wonder Building Corporation of America, Bankrupt Docket Number 62B5669 have not been closed, that the books and records of the bankrupt corporation are in the possession of Mr. Charles David Mahle, 2317 South LaSalle Street, Trustee in Bankruptcy, and with the American Auction Associates, Inc., 12 North Halsted Street, Chicago, and such books and records are available for inspection.

Your Honor, this information was obtained by counsel for respondent in conversations with this gentleman and also with Mr. Michael Corlon of the American Auction Association whose address I just gave. So these records are available from which the petitioner could obtain facts necessary to allege in his petition and to support his assignments of error, and we therefore move to require him to allege facts in support of his assignments of error.

The Court: Are all of them alike?

Mr. Coxe: All three cases are identical, your Honor, verbatim, if I am not mistaken. There may be some figures in the first part of it, but they are verbatim in respect to the paragraph we are talking about, paragraph six.

The Court: I will grant the motion for a better statement setting forth facts to support the allegations of error.

4 lines of copy illegible*

Mr. Coxe: Your Honor, I would, if I might suggest the way this type of motion is usually handled is to grant the motion and to give them until a certain time, or to con-

---

* Illegible.

tinue the motion to give the petitioner time within which to file amended petition.

The Court: We will give them time. How much time is usually given?

Mr. Locke: About thirty days.

The Court: Give them thirty days to file.

Mr. Coxe: Then an order to show cause why it should not be dismissed if they don't comply.

The Court: Very well. This case seems to me to be a little different from the ordinary case of failure to properly set forth facts.

Mr. Coxe: It is, Your Honor.

The Court: And it is a substantial case, and the matter is in bankruptcy, and it might be difficult at the moment to get all the facts, so I don't think it ought to be dismissed.

Mr. Coxe: No, sir, Your Honor, and as a matter of fact, the reason respondent chose the motion under Rule 7 was that there were no facts alleged when there could be, rather than a further and better statement which presumed that there have been some facts, but not enough alleged. So this was why respondent brought this motion. Thank you, Your Honor.

(Whereupon at 10:15 a.m., the hearing in the above-entitled matter was adjourned.)

Petitioners Telegram Received by Tax Court on February 17, 1965 at 8:57 A.M.:

IRS WSH
WU WSH
TLXA073 TLX 070 (32)CTB160
CT CA174 PD Chicago Ill. 16 108P CST
Tax Court of the United States
WashDC

Re Edward and Patricia Martin, Et Al. Dockets 3863-64-65. Request Further Extension For Reasonable Time to Determine Course of Action for Reason Stated In My Telegram of December 28 and No Response As to Request for Transcripts of Proceedings
John O C Fitzgerald
(30).

Tax Court Transcript of Proceedings of Hearing on December 30, 1964:

BEFORE THE TAX COURT OF THE UNITED STATES,
Washington.

EDWARD MARTIN, ET AL., *Petitioners,* *vs.* COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Docket No. 3863-64. 3864-64. 3865-64.

Courtroom No. 2,
Internal Revenue Building
Washington, D. C.,
Wednesday, December 30, 1964.

Met, pursuant to notice, at 11:32 o'clock a.m.

Before:

Honorable John W. Kern, Judge,

Appearances:

Andrew S. Coxe, Esq., appearing on behalf of the respondent.

Proceedings.

The Clerk: 3863-64, Edward Martin and related petitioners.

Mr. Coxe: Andrew S. Coxe for respondent, your Honor.

Your Honor, this is before us upon the continuation from a prior hearing conducted by Judge Arundell, who granted respondent's motion and gave the petition until this date to file an amended petition setting forth facts to support the allegations. May I inquire of the Court whether there has been—

The Court: The file discloses nothing has been filed since the entry of the order dated November 25.

Mr. Coxe: Your Honor, if I might so move, I would ask the Court to enter an order dismissing the petitions in these three cases for failure properly to prosecute.

These are not fraud cases. This is the original motion, of course, to dismiss for failure properly to prosecute. Judge Arundell felt that if they could file a proper petition they should be given the opportunity to do so. Not having done so, I see no reason why the Court cannot now dismiss these cases as requested.

The Court: Well, the files in these cases show that the petitioners have not filed any amended petition. The respondent's motion to dismiss for failure properly to prosecute will be granted.

Mr. Coxe: Thank you, your Honor.

(Whereupon, at 11:35 a.m., hearing in the above-entitled matter was concluded.)

Tax Court Order of December 30, 1964:

TAX COURT OF THE UNITED STATES.
Washington.

EDWARD MARTIN and PATRICIA MARTIN, ET AL.; *Petitioners,* *vs.* COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Docket No. 3863-64. 3864-64. 3865-64.

ORDER.

Pursuant to petitioners' informal request for a continuance of respondent's motions to dismiss for failure properly to prosecute, it is

ORDERED that the hearing on respondent's motions to dismiss for failure to properly prosecute is continued to February 17, 1965, at 10:00 A.M., in Courtroom No. 2, 12th Street and Constitution Avenue, N. W., Washington, D. C.

JOHN W. KERN,
Judge.

Dated: Washington, D. C.
December 30, 1964.

Tax Court Order of February 17, 1965.

TAX COURT OF THE UNITED STATES,
Washington.

EDWARD MARTIN and PATRICIA MARTIN, ET AL., *Petitioners,* *vs.* COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Docket No. 3863-64. 3864-64. 3865-64.

ORDER.

These cases were called from the motions calendar at Washington, D. C. on February 17, 1965, for hearing on respondent's motion to dismiss for failure to properly prosecute. The Court received a telegram from counsel for petitioners requesting further extension. After due consideration, it is

ORDERED that the petitioners are directed to file on or before March 17, 1965, a proper amended petition in accordance with the Court's Rules of Practice, and the hearing on respondent's motion to dismiss for failure to properly prosecute is continued to March 17, 1965, at 10:00 A.M., in Courtroom No. 2, 12th Street and Constitution Avenue, N. W., Washington D. C., without further continuance.

NORMAN O. TIETJENS,
Judge.

Dated: Washington, D. C.
February 17, 1965.

Orders of March 19, 1965 appealed to United States District Court from the Tax Court:

As to Edward and Patricia Martin:

ORDER OF DISMISSAL.

This case was called from the motions calendar at Washington, D. C., on March 17, 1965, for hearing on respondent's motion to dismiss for failure to properly prosecute. No appearance was made by or on behalf of the petitioners, nor did petitioners file an amended petition as directed in the Court's order dated February 17, 1965. The motion was argued by counsel for respondent. After due consideration, it is

ORDERED that respondent's motion to dismiss is granted and this case is dismissed for failure to properly prosecute. It is further

ORDERED AND DECIDED that there are deficiencies in income tax and additions to tax due from the petitioners as follows:

		Additions to Tax, I.R.C. 1954		
Year	Income Tax	Sec. 6653(a)	Sec. 6651(a)	Sec. 6654
1957	$ 8,011.26	$400.56		
1958	8,297.33	414.87		
1959	13,469.28	673.46		
1960	5,588.61	552.95	$1,397.15	$90.84
1961	4,271.60	487.10	1,067.90	53.96

NORMAN O. TIETGEN,
Judge.

Enter: Mar. 19, 1965.

As to Peter S. Pedersen, Sr. and Marion D. Pedersen:

ORDER OF DISMISSAL.

This case was called from the motions calendar at Washington, D. C., on March 17, 1965, for hearing on respondent's motion to dismiss for failure to properly prosecute. No appearance was made by or on behalf of the petitioners, nor did petitioners file an amended petition as directed in the Court's order dated February 17, 1965. The motion was argued by counsel for respondent. After due consideration, it is

ORDERED that respondent's motion to dismiss is granted and this case is dismissed for failure to properly prosecute. It is further

ORDERED AND DECIDED that there are deficiencies in income tax and additions to tax due from the petitioners as follows:

Year	Income Tax	Additions to Tax, I.R.C. 1954 Sec.6653(a)
1957	$12,644.34	$ 632.22
1959	20,437.39	1,021.87
1960	12,762.82	638.14
1961	10,563.80	528.19

NORMAN O. TIETGEN,
Judge.

Enter: Mar. 19, 1965.

As to Peter S. Pedersen, Sr. alone:

ORDER OF DISMISSAL.

This case was called from the motions calendar at Washington, D. C., on March 17, 1965, for hearing on respondent's motion to dismiss for failure to properly prosecute. No appearance was made by or on behalf of the petitioner, nor did petitioner file an amended petition as directed in the Court's order dated February 17, 1965. The motion was argued by counsel for respondent. After due consideration, it is

ORDERED AND DECIDED that there is a deficiency in income tax and addition to tax under Section 6653(a) of the Internal Revenue Code of 1954 due from the petitioner for the taxable year 1958 in the respective amounts of $17,511.06 and $875.55.

NORMAN O. TIETGEN,
Judge.

Enter: Mar. 19, 1965.

Petition of Edward and Patricia Martin for Review of Tax Court Decision:

IN THE UNITED STATES COURT OF APPEALS,
FOR THE SEVENTH CIRCUIT.

Tax Court Docket No. 3863-64.

EDWARD MARTIN and PATRICIA MARTIN, *Petitioners on Review,* *vs.* COMMISSIONER OF INTERNAL REVENUE, *Respondent on Review.*	Docket No. 3863-64.

PETITION FOR REVIEW OF DECISION OF THE TAX COURT OF THE UNITED STATES.

To: The Honorable Judges of the United States Court of Appeals for the Seventh Circuit.

Edward Martin and Patricia Martin, the petitioners in this cause, by John O.'C. FitzGerald, their counsel, hereby file their Petition for the Review by the United States Court of Appeals for the Seventh Circuit of the decision of The Tax Court of the United States, entered on March 19, 1965, Tax Court Docket No. 3863-64.

1. Dismissing the case for failure properly to prosecute on the ground that the petition does not, in important stated particulars, comply with Rule 7 of the Rules of this Court; and

2. Affirming respondent's determining a deficiency in petitioners' Federal Income Tax and Penalties, for the taxable years:

(a) ended December 31, 1957, tax in the amount of

$8,011.26, with negligence penalty under 1954 Code, section 6653(a) of $400.56; and

(b) ended December 31, 1958, tax in the amount of $8,297.33 with negligence penalty under 1954 Code, Section 6653(a) of $414.87; and

(c) ended December 31, 1959, tax in the amount of $13,469.28, with negligence penalty under 1954 Code, section 6653(a) of $675.46; and

(d) ended December 31, 1960, tax in the amount of $5,588.61, with negligence penalty under 1954 Code, section 6653(a) of $552.95 and delinquency penalty under 1954 Code, Section 6651 of $1,397.15, and estimated tax penalty under 1954 Code, Section 6654 of $90.84; and

(e) ended December 31, 1961, tax in the amount of $4,271.60, with negligence penalty under 1954 Code, Section 6653(a) of $487.10, and delinquency penalty under 1954 Code, Section 6651 of $1,067.90, and estimated tax penalty under 1954 Code, Section 6654 of $53.96; and

3. Thereby, sustaining respondent's motion in substance and to the effect that the petition filed by petitioners in the Tax Court appealing from said determination of alleged Federal income taxes and deficiencies "failed to conform to Rule 7(c) of the Tax Court's Rules of Practice" in that:

(a) "it fails to set forth a clear and concise statement of the facts upon which petitioners rely as sustaining the assignments of error"; and

(b) "In fact, the petition fails to allege any facts stating that it is impossible to present facts because the corporate books and records of the MPH Manufacturing Corporation and the Wonder Building Corporation of America have been destroyed, damaged, lost or misplaced. See paragraph 6 of the petition"; and overruling petitioners' objections, answer and suggestions to respondent's said motion to dismiss; and

4. Affirming respondent's said determination of alleged deficiencies of Federal Income Taxes and Penalties; and

5. Thereby, by implication, denying petitioners counter-motion to:

(a) Furnish petitioners, at their expense, with a certified copy of the transcript of any and all proceedings before the Tax Court at the time of the hearing of said respondent's motion to dismiss the case, etc., and at the time of any and all continued hearings of said respondents motion, because neither petitioners, nor any attorney or representative thereof, were present at any of said hearings all had at Washington, D. C., and necessary to enable petitioners and their attorneys to determine whether to amend their said petition filed in the Tax Court appealing from said determination of and by respondent, or other action in and about the premises; and

(b) Amend said petition filed, as aforesaid, with the Tax Court.

I.

Jurisdiction.

The petitioners on review are the Taxpayers against whom said alleged deficiencies and penalties are assessed by the Respondent on Review and The Tax Court The Federal Income Tax Returns of the Taxpayers for the years 1957 through 1961, the years in question, were duly filed with the District Director of Internal Revenue, at Chicago, Illinois, whose office is located within the jurisdiction of the United States Court of Appeals for the Seventh Circuit.

The petitioner files this petition pursuant to the provisions of Sections 7482 and 7483 of the Internal Code of 1954.

II.

Nature of controversy.

The taxes in controversy are Federal Income Taxes and Penalties as claimed deficiencies for the taxable years:

(a) ended December 31, 1957, tax in the amount of $8,011.26, with negligence penalty under 1954 IRS Code, Section 6653 (a) of $400.56; and

(b) ended December 31, 1958, tax in the amount of $8,297.33 with negligence penalty under 1954 Code, Section 6653(a) of $414.87; and

(c) ended December 31, 1959, tax in the amount of $13,469.28, with negligence penalty under 1954 Code, Section 6653(a) of $675.46; and

(d) ended December 31, 1960, tax in the amount of $5,588.61, with negligence penalty under 1954 Code, Section 6653(a) of $552.95 and delinquency penalty under 1954 Code, Section 6651 of $1,397.15, and estimated tax penalty under 1954 Code, Section 6654 of $90.84; and

(e) ended December 31, 1961, tax in the amount of $4,271.60, with negligence penalty under 1954 Code, Section 6653(a) of $487.10, and delinquency penalty under 1954 Code, Section 6651 of $1,067.90, and estimated tax penalty under 1954 Code, Section 6654 of $53.96; and

Petitioners on Review in and by their said petition before the Tax Court further alleged and stated that the facts upon which Petitioners relied, other than the ultimate facts stated above, as a basis of said appeal to the Tax Court were impossible to present because:

(a) Said MPH Manufacturing Corporation and Wonder Building Corporation has been adjudged a bankrupt and Petitioners are reliably informed and believe, and therefore state the fact to be, that certain of said corporate books, records, belongings and effects have been:

(a-1) Destroyed and/or irreparably damaged by unavoidable fire; and

(b) lost and/or misplaced while, and caused by, loss of lease of premises occupied by said corporation, and Writ of Restitution Proceedings brought by Lessor; and

(c) incapable of obtaining because of commingling and inadequate cataloging of large volumes of said books, records, belongings and effects, not destroyed by fire or otherwise lost or misplaced.

Respondent's claimed tax deficiencies and penalties are predicated and based upon the following:

The principal causes of the deficiencies and penalties was and is the disallowance of unsubstantiated apartment rental for business use, home food, liquor and maid service claimed as business lodging and restaurants itemized deductions; losses from non-business bad debts, traveling expenses and increasing income for the amount of dividends from said M. P. H. Manufacturing Corporation, Inc. Delinquincy penalties are a result of failing to file the 1960 and 1961 returns, negligence penalty and consistently claiming personal expenses as business expenses and for years 1959, 1960 and 1961 underestimating penalty for failing to pay at least 70% by filing date.

Petitioners on Review in and by their appeal to the Tax Court, in their petition filed therein, alleged and stated that:

Respondent erred in determining said claimed tax deficiencies and penalties and liability against Petitioners for each of the calendar years 1957, 1958, 1959, 1960 and 1961, as stated and detailed in pages 1 thru 8, and Exhibits "A" and "B" of the Statement attached to the Notice of Deficiency, and made a part of their petition before the Tax Court for the reasons that:

(a) Each and every of the disallowel items were in fact substantially, properly and accurately and realistically sub-

stantiated by Petitioners, and were in fact paid and were allowable deductions under the 1954 Code and applicable sections, rules and regulations thereof; and

(b) Returns for the calendar years 1960 and 1961 were not filed within the time prescribed by law because the fully licensed and practicing certified public accountant duly registered as such with the Internal Revenue Service engaged by Petitioners was unable to complete Petitioners' returns on time and Petitioners, relying on said certified public accountant to well and timely prepare and file said returns, was unable to timely file the same; and, therefore, no 25% penalty under section 6651 of the 1954 Code, or otherwise, should be assessed against Petitioners in and about the premises; and

(c) Additional income assessed as dividends received should not be so assessed because each and all of the several questioned items and amounts were corporate and not personal expenditures and were for the benefit of the respective corporation and not personal to Petitioners or either of them; and

(d) Saf-All Installation Company actually existed as a business company, and Petitioners actually paid the several amounts for the uses and purposes stated in or shown by their returns, and the same were properly allowable and deductible under 1954 Code and applicable sections thereof and IRS Rules and Regulations with respect thereto; and

(e) Bloc-Loc, Inc. items and amounts as shown in the return factually and actually constituted a loss as Bloc-Loc, Inc. was forced to discontinue the use of its name because of prior use by another corporation, and became non-existent and without funds or property; and

(f) Recording Company investment items and amounts were actually paid by Petitioners for the uses and purposes stated in or shown by the returns; and

(g) Claimed increased capital gains in the amount of $10,777.61 for the year 1959, due to disallowance of short-term capital losses of $15,400.00 because, as Respondent claims, Petitioners did not establish any portion of said amount to be deductible; and

(h) As well as in each and every item and detail, going to make up Respondent's Computation of Tax, other than as shown by Petitioners' return * * * all of which errors are shown in and by Petitioners' returns for said calendar years, respectively, and were substantiated by facts to be proper, accurate and realistic by determination of a duly licensed and practicing certified public accountant duly registered with the Internal Revenue Service, who prepared and filed said Petitioners' returns for the calendar years 1957 through 1961.

Respondent, under Rule 7(a)(2) of the Tax Court, moved to dismiss The Tax Court Case for failure to properly prosecute and to enter its decision sustaining said claimed deficiencies and penalties in that the petition before The Tax Court failed to state clear and concise facts to sustain the assignments of error.

Rule 7 of The Tax Court in pertinent part reads:

(a) Petition.

(2) Improper petition—Dismissal—Failure of a petition to comply with this Rule * * * shall be ground for dismissal of the case.

(c) Form of petition.

(1) The petition shall be substantially in accordance with form as shown in Appendix I.

(4) The petition shall contain:

(B) 5. Clear and concise lettered statements of facts upon which the petitioner relies as sustaining the assignments of error, except those assignments of error in respect

of which the burden of proof by statute is placed upon the Commissioner.

Upon the filing of Respondent's said Motion to Dismiss, The Tax Court entered an order in substance and effect that Respondent's Motion "indicates, in the absence of other facts, and on the present state of the record, that the petition on file does not comply with the Rules of the Court, and, accordingly, * * * Ordered, that this case be dismissed for failure to prosecute unless petitioner, * * * files (a) an amended petition * * * or (b) written objections to respondent's Motion showing cause why this case should not be dismissed * * *."

Petitioner duly filed her written objections, answer and suggestions to Respondent's Motion to Dismiss Proceeding for Failure to Properly Prosecute stating and pointing out that she had stated with sufficient particularity facts creating issues warranting a hearing on the merits and the attendance and swearing of witnesses and the introduction of testimony and evidence, and asked The Tax Court to deny Respondent's Motion to Dismiss and to enter a rule on Respondent to answer her petition and to set the case for hearing at Chicago, Illinois; or, in the alternative, should The Tax Court sustain Respondent's Motion to dismiss that she be given a reasonable time to either file an amendment to her petition or an amended petition.

The Tax Court then discharged its order that the case be dismissed for failure to properly prosecute unless petitioner file (a) an amended petition or (b) written objections to Respondent's Motion to Dismiss, and calendared for hearing Respondent's said Motion to Dismiss at Washington, D. C.

On the date then set for the hearing and disposition of Respondent's said Motion to Dismiss, The Tax Court

granted said Motion to Dismiss, and dismissed the case, for failure to properly prosecute and affirmed said claimed tax deficiencies and penalties and liability against petitioners, without affirmatively acting upon petitioners cross-motion and alternative request to be allowed to file an amended petition or amendment to their petition.

Petitioners also duly and timely moved The Tax Court for the furnishing, at petitioners cost, of a transcript of any and all proceedings had by and before The Tax Court, at Washington, D. C., with respect to said Motion to Dismiss and petitioners said written objections, answer and suggestions thereto, to enable petitioners to determine the need and advisability of filing either an amended petition or an amendment to the petition, none of which transcripts were ever furnished, nor were petitioners or their attorney of record ever apprised of what action, if any, The Tax Court ever took with respect to the same.

From each of the said orders, inactions and decisions of and by The Tax Court, petitioners on Review prosecute this appeal.

III.

Assignment of Errors.

The Petitioners on Review assign as error the following acts and omissions of The Tax of the United States, namely:

1. The Tax Court erred in sustaining Respondent's Motion to Dismiss the case for failure to properly prosecute for that:

(a) Rule 7(a)(2), (c)(4)(A)(B)(5) and each and every thereof, are:

(a-1) Unconstitutional or, as applied by The Tax Court in and about its sustaining of Respondent's Motion to Dismiss the case for failure to properly prosecute.

(a-2) Yields or tends to yield an unconstitutional result,

for that same contravenes and violates the "Due Process" Clause, Amendment 5, "the deprivation of property without due process of law" clause of the Constitution of the United States.

(b) In the alternative, assuming said Rule 7(a)(2), (c)(4)(A)(B)(5) of The Tax Court to be Constitutional, and according to good and proper practice and procedure, then, and in that event, the petition before The Tax Court conformed to, and with, said Rule 7 and said provisions and requirements, in that there was and is alleged and stated therein:

(b-1) Clear and concise statements of facts upon which the Petitioners did, and do, rely as sustaining the assignments of error, and such as were, and are, adequate to create, and apprise Respondent and The Tax Court of, the issues for the determination of and by The Tax Court.

(b-2) Or, in the alternative, because, prior to the bankruptcy of MPH Manufacturing Corporation, an Illinois corporation, and of Wonder Building Corporation of America, Inc., a Delaware corporation, duly qualified to do business as said foreign corporation by and in the State of Illinois, and during the time leading up to, and at, the time of, said determination of said purported tax deficiencies and penalties.

(b-2-a) Respondent, had, and still has, control over all of the material, competent and pertinent books and records or copies thereof, or work papers therefrom, of each of said corporations, showing and evidencing, at all pertinent times, the principal source of income, derived by Petitioners.

(b-2-b) The Tax Court being a continuation of the Board of Tax Appeals as "an independent agency in the Executive Branch of the Government, at all pertinent times, if same is to be considered as a court at all, (which peti-

tioners expressly disclaim), was and is a court of limited special jurisdiction, namely: of, concerning and pertaining to taxes, and, therefore, because, as previously stated above, at all pertinent times.

(b-2-c) Said Executive Branch of the Government had and still has said books and records of each of said bankrupt corporations, or copies thereof or work papers therefrom.

(b-2-d) Petitioners did not, and do not, have such advantage and benefit thereof, for the reason that certain of said books and records and of the belongings and effects, of said bankrupt corporations, were and are, by others than Respondent, Petitioners, and the Receiver in Bankruptcy, unintentionally.

(b-2-d-1) Destroyed, and/or irreparably damaged by unavoidable fire; and/or

(b-2-d-2) Lost and/or misplaced while and caused by, loss of lease of premises occupied by said bankrupt corporations, and removal from said premises by forcible-detainer action and judgment and Writs of a Court of competent jurisdiction;

(b-2-d-3) Incapable of obtaining because of commingling and inadequate cataloging of large volumes of said books, records, belongings and effects, not destroyed by fire or otherwise lost or misplaced.

The Tax Court as well as Respondent, but not Petitioners, had, and still have, any and all material, competent and pertinent, facts, "concise and clear" and/or otherwise, as well as the evidence; and, further, because the Federal Income Tax Statutes, Rules and Regulations and Decisions are so "complex and confusing" that even the courts, both the Tax Court and the reviewing courts, have, many times, disagreed with the rulings of the Internal Revenue Service but among themselves; and, therefore, The Tax Court and

the Reviewing Courts, under the facts and circumstances of this case as heretofore and herein stated, and by the record, at the posture of pleading should not be so dismissed "for failure to properly prosecute", as aforesaid; and by implication.

(c) Denying the several motions of petitioners requesting that they be furnished, at petitioners cost and expense, with a certified copy of any and all hearings held by The Tax Court, at Washington, D. C., neither petitioners nor their attorney of record or other representative being present, of, concerning, pertaining and with respect to Respondent's Motion to Dismiss the case for failure to properly prosecute, as aforesaid, so as to enable petitioners and their attorney of record to determine whether an amended petition, or an amendment to the petition, before The Tax Court should, or could be had; and

(d) Overruling petitioners objections, answer and suggestions addressed to Respondents' Motion to Dismiss the case "for failure to properly prosecute", as aforesaid; and

(e) Denying petitioners' request that, in the event said objections, answer and suggestion of petitioners be denied and respondent's Motion to Dismiss, as aforesaid, be sustained, that then, and in that event, petitioners be allowed to either:

(e-1) Amend their said petition or

(e-2) File an amended petition before The Tax Court, in and about the premises.

2. The Tax Court erred in deciding that the alleged deficiencies and penalties were due and payable by Petitioners; and

3. Said decision of The Tax Court, and said sustaining of Respondents' Motion to Dismiss and overruling by implication Petitioners' objections, answer suggestion and

counter-motions, in and about the premises, deprived Petitioners of "due process of law" according to:

3(a) The provisions of the Amendments to the Constitution of the United States, the "Bill of Rights"; and

3(b) The decision of the United States Court of Appeals, Seventh Circuit, in the case of *Thomas Hart Fisher et al.* v. *C. I. R.*, 149 F. (2d) 540, 33 AFTR 1408 (7th Circ. 1945).

4. The Tax Court erred in deciding that the alleged deficiencies and penalties, as determined by the Respondent, were and are due from and payable by Petitioners.

Wherefore, Petitioners pray that the decision of the Tax Court of the United States Court of Appeals for the Seventh Circuit, and be reversed and remanded with appropriate directions.

/s/ JOHN O'C. FITZGERALD,
John O'C. FitzGerald,
10 South LaSalle Street
(S. 1540),
Chicago, Illinois 60603,
CEntral 6-2222,
Attorney for Petitioners on Review.